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No. 2396

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

COLUMBIA RIVER PACKERS' ASSOCIA-
TION, a Corporation,

Appellant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Appellees.

VOLUME II.


(Pages 353 to 755, Inclusive.)

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

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for the Western District of Washington,
Southern Division.

(Testimony of Erick Lindstrom.)

Q. Now, you said you obtained three licenses for set nets?

A. I took out three licenses in my own name.

Q. Did you pay for them yourself?

A. I haven't a bill for it; my earnings are in the office and my expenses are paid and I don't have to pay until I get the bill.

Q. Have you received a statement of account since June, 1908? A. Yes, I had a yearly statement.

Q. Were you charged with these three license fees? A. No, I have not seen that.

Q. You were not charged with the cost of constructing the three anchors in this statement which was furnished you?

A. No, McGowan would not charge me anything; it was a failure; I had a big family and he took pity on me and I didn't see any charges against me.

Q. Did either of the McGowans make a statement of that character to you?

A. They do not brag about it.

Q. They did not say a word to you? A. No.

Q. You and the McGowans never discussed the expense you went to in these fishing operations?

A. No, sir, expense don't count with those gentlemen.

Q. You employed some men to look after these set net locations? A. Yes.

Q. Who were those gentlemen?

A. Iver Stensland and a man named Bussey.

Q. Which was the cowboy?

A. Bussey was the cowboy.

(Testimony of Erick Lindstrom.)

Q. How long did Iver Stensland and Bussey the cowboy work for you there?

A. I could not tell you; I was not down there any more. [315]

Q. You simply put in your three set nets buoys and came away? A. I helped to put them all in.

Q. You assisted in putting in the sixteen buoys and went away and gave the matter no further consideration? A. That is right.

Q. You did not give it any further attention?

A. No, I was stopped.

Q. You were not moving very rapidly when you were stopped; you were not making any record speed?

A. No; I saw when I was stopped I had to pitch in and make a living for my family; a man must keep busy.

Q. You don't know how long Stensland and Bussey worked?

A. No; I did not see when they quit or when they started, but I know when they were there, because they came up for more buoys when they claimed the others were taken out.

Q. You don't know how much they charged for their labor?

A. No; I haven't had any statement of it.

Q. What was your idea in putting those two gentlemen, Stensland and Bussey, as watchmen down there?

A. A man can hire most anybody for a watchman.

(Testimony of Erick Lindstrom.)

Q. But you don't understand; what was your purpose in that?

A. To see and find out when these buoys were taken away; where they went to; we weren't talking much to them; they were hired to put them there.

Q. They were not fishing?

A. They were supposed to fish; I didn't see them fish. I did not see the nets, but they said they had two set nets, but I did not see them.

Q. They did not fish any net for you?

A. I don't know whether they used my location or not.

Q. You furnished no net?

A. I did not furnish anything. [316]

Q. Didn't you think that was a piece of reckless extravagance for a man with a family of nine children to employ two men to watch some buoys in the river?

A. I supposed they were furnished fish nets, but I didn't see them.

Q. Did you employ them to fish any nets or simply to watch and see whether someone took up your buoys?

A. They were hired to look after them buoys and fish, but they put the nets on to hold the license until we were ready to fish.

Q. But you did not pay any attention to whether or not there were any nets prepared for fishing?

A. No, Stensland attended to that himself; he was a fisherman.

(Testimony of Erick Lindstrom.)

Q. How did you expect to get six nets to operate those locations?

A. We never got a chance to operate any.

Q. But when you started you expected to operate them and hired men to operate them without any nets. A. They had two nets.

Q. You didn't get them? A. No, I didn't.

Q. Now here, you would not want the Court to understand that you would claim that you employed these two men to fish eight set net locations that you tell the Court required eight men to fish?

A. They were there to hold and see about those buoys.

Q. They were simply there to watch the buoys?

A. Yes, and they had two set nets which they were supposed to use.

Q. But they were not your set nets?

A. They were fitted out, whether they got the gear from the cannery, I don't know.

Q. They were not yours?

A. They were not my nets, no. [317]

Q. As a matter of fact, you were not paying any particular attention to fishing, but wanted those men to watch those buoys?

A. I was not going to pay a great deal of attention until I was fitted out to fish.

Q. But you didn't really employ those men to fish eight set net locations?

A. No, they were simply hired to watch the buoys by us three.

Q. Hired by you three men to watch the buoys?

(Testimony of Erick Lindstrom.)

A. That was my calculations, and they had the nets, but I don't know whether they fished them.

Q. You never inquired whether they fished them or not? A. No.

Q. Did you ever ask whether they caught any fish or not? A. No, I never did.

Q. What kind of nets were these?

A. I don't know; I never saw them.

Q. You will pardon me if I appear to be curious to know why you hired them to go out there and did not pay any attention to whether they had nets or whether they fished or whether they caught fish.

A. I couldn't afford to look after the locations until I was ready to fish and I expect the fish to be there.

Q. The fish are supposed to be there about when?

A. The latter part of June and during the month of July and up to the close of the season.

Q. Now, as I understand, the men were not employed to fish these set net locations, but to watch them? A. I did not hire them to fish my location.

Q. But just to watch them.

A. To watch them, and they had two nets with them, and I supposed they fished, but I don't know.

Q. They were not employed to fish? [318]

A. I didn't own all of the locations.

Q. You did not employ them to fish?

A. I did not employ them.

Q. You were not there when they were employed jointly by yourself and Mr. Coyle and Mr. H. S. McGowan? A. Yes.

(Testimony of Erick Lindstrom.)

Q. And your understanding was that they were not employed to fish but to watch the buoys?

A. Yes, and they had two nets with them.

Q. That is, you heard that they did?

A. I did not see them; I heard that they had them.

Q. What was your idea of having them watch these set net locations, is that the general practice—hiring men to watch?

A. That is the general practice on the Columbia River. If you have anything of value you must have it watched until you are there to take care of it yourself.

Q. That is the general rule; when a man puts up his three location stakes for a fish-trap he has someone hired right there to watch them all the time?

A. Fish-traps, no one can take out your stake when it is driven in by a pile-driver.

Q. It is not the practice to watch the fish-traps and piling?

A. I don't know much about trapping; I am not a trapper.

Q. Now from 1905 to 1910 how many instances did you know where men were employed to watch an anchor for a set net?

A. I guess this is the first set nets I ever put out, and I had nothing to do with it.

Q. The reason I asked you this question. You said it was the general practice to do that?

A. When you have a valuable property.

Q. You were not referring to anchors of set nets?

[319] A. To anything of value.

(Testimony of Erick Lindstrom.)

Q. If you never heard of it being done, then of course you could not testify as to the general practice?

A. Not to set net licenses; that is something new on the lower Columbia River.

Q. So, there not being any practice in that regard, I hope you will pardon me if I ask you again why was it you employed these men simply to watch these anchors?

A. To see if they were taken away and so that we would know where they went.

Q. Did you imagine that someone would take them away?

A. When you have a good thing you may lose it, yes.

Q. Who did you imagine was going to take these away? A. I could not say that.

Q. You had no idea that anyone particularly, person or individual, would take them?

A. No; I knew I had a perfect right myself; I was not in anybody's runway.

Q. And yet you employed two men to go down there and watch them? A. Yes.

Q. What was the reason for that?

A. That is the reason.

Q. Did you inquire whether these set nets would interfere with the seining on Sand Island?

A. I have nothing to do with the seiners.

Q. But did you inquire as to whether or not this would interfere with anyone seining on Sand Island?

A. I did not find it my place to inquire.

Q. And did you inquire? A. No, sir, I did not.

(Testimony of Erick Lindstrom.)

Q. Of course you knew that the Columbia River Packers' [320] Association had rented Sites Two and Three?

A. I could not remember whether I knew it, and if I did I did not care. They did not run outside of the low-water mark, to my knowledge.

Is it not a fact that the reason you employed these men to watch these anchors you put there was because the Columbia River Packers' Association was getting ready to seine, and these buoys would be right in their way, and they would have to take them out or not seine?

A. There was nothing said why they were put there.

Q. But I say that was not the reason?

A. I cannot give you any particular reason.

Q. But that was not the reason?

A. I cannot answer that.

Q. Now listen, you knew that, if that is not the reason, that you had heard in a general way that the Columbia River Packers' Association had rented the sites and intended to operate a seine from the shore, and that in operating that seine they would have to take out your anchors? A. Well I should suppose.

Q. And was not that the reason you employed these men? A. Well they were there to watch.

Q. Wasn't that the reason you employed them?

A. I cannot give any particular reason; we did not have any particular reason to send them there. We sent them with two nets; that is all I can answer.

(Testimony of Erick Lindstrom.)

Q. Then you will tell the Court under oath that that was not the reason?

A. I cannot give any particular reason.

Q. Will you swear that was not the reason then?

A. All right; swear; I will not swear it was or was not.

Q. That is all right then. Why was it that you suddenly made [321] up your mind that the year 1908, and in the month of June, 1908, to put these set net buoys in front of Sites Two and Three; can you tell me that?

A. Yes, sir; I was fishing on the upper river and knew what set nets did there and when I came down and found Sand Island was one of the best fishing grounds on the Columbia River, and the best one, I picked out my sites and made up my mind the first opportunity I could secure a license, I would get them and fish them.

Q. Now at what particular psychological moment did you make up your mind to that proposition?

A. In the same year the license was taken out.

Q. Do you wish the Court to understand that during all these years from 1895 to 1908 you had not made up your mind to put in these set nets?

A. I was only down there five years on the lower river.

Q. When did you first come down to McGowan on the lower Columbia River? A. Five years ago.

Q. That would be 1905? A. Yes.

Q. Was that the first part or the last part of the fishing season?

(Testimony of Erick Lindstrom.)

A. In January; well, it was in the winter.

Q. It was in the winter of 1905? A. Yes.

Q. Do you think it was January?

A. I could not say exactly.

Q. When did you first become acquainted with Sand Island?

A. I was down there helping Mr. McGowan and saw the fish rolling in and they looked good to me.

Q. That was in 1905? [322] A. I think so.

Q. Was that in 1905 you were down on Sand Island where McGowan was fishing and made up your mind that you would get a set net proposition?

A. Yes, sir.

Q. Why didn't you put in set nets in the river?

A. I did not feel like doing that.

Q. Why? A. Because I was not ready.

Q. What do you mean by that?

A. A man must study on the thing a little.

Q. Was that the only reason you did not put set nets in front of where McGowan was seining, because you was not ready? A. No, I was not ready.

Q. That was the reason? A. Yes, sir.

Q. How long did you consider that proposition—all summer?

A. I considered it until I took out those licenses.

Q. You were thinking about putting set net locations in front of Sand Island from 1905 until June, 1908?

A. I was not losing any sleep thinking of it, but I made up my mind in 1908 that I would take up the license and I did.

(Testimony of Erick Lindstrom.)

Q. Anybody suggest it to you? A. No, sir.

Q. Not a soul? A. Not a bit of it.

Q. You wrote to the Fish Commissioner yourself?

A. I had McGowan write for me; could not write English very well.

Q. You spoke to McGowan and told him you would like to take out three licenses? A. Yes, sir.

Q. Did you know that McGowan had a fishing right there? [323]

A. I knew he would know whether there was a site or not.

Q. You were the first who suggested it to Mr. McGowan?

A. Well, I can't tell you that, I know I asked him.

Q. That was an important period in your life?

A. I asked him if I could get out set net licenses, and that I would send for them, and he sent for them for me.

Q. And that is all there is to it; did he say he would put in a set net there himself?

A. He did not tell me anything about it.

Q. Weren't you considerably surprised when you discovered that Mr. McGowan arrived at that same conclusion at the same time, and he had two licenses?

A. The more the merrier.

Q. You were not surprised at all? A. No.

Q. Were you surprised when Mr. Coyle also showed up with three licenses on the same Sand Island? A. Not much.

Q. When was it you three got together and came to some kind of an agreement?

(Testimony of Erick Lindstrom.)

A. When we signed up the application for the license.

Q. I thought you said a moment ago that nobody spoke to you about the application, but you told McGowan and he sent for it and you did not know he had any?

A. I seen them somewhere; I don't know where.

Q. The truth is that you three got together and set up this job that you were to get three licenses and McGowan two and Coyle three licenses?

A. I knew I was to get three.

Q. You all three got together and made up an agreement before you applied for the licenses?

A. I can't just remember about that. [324]

Q. That is not a very important feature in the transaction and you have forgotten? A. Yes.

Q. When was it that you and McGowan and Coyle came to terms; where did you agree to operate these set nets together?

A. It would be cheaper to handle them that way.

Q. I know that is a good scheme, but where did you come to a conclusion? Was it before or after you got your licenses? A. I wanted three licenses.

Q. But I want to know when it was you and McGowan and Coyle agreed together that you would operate these grounds together; was it before you applied for your license or afterwards?

A. I talked to McGowan first, and then I suppose they made up their minds to get licenses too, but that I have nothing to do with. Anyhow we got the three licenses at the same time.

(Testimony of Erick Lindstrom.)

Q. Now answer the question.

(Question read.)

A. I can't remember that.

Q. Do you remember where you were when you and Mr. McGowan and Mr. Coyle agreed to operate these grounds together?

A. It was at McGowan's, I am pretty sure.

Q. Was Mr. Coyle there too?

A. I can't remember; anyhow I spoke to Mr. McGowan to send for my license, whether it was at the cannery or not, I don't know.

Q. Was this agreement to operate these traps together in writing or verbally?

A. There was no writing needed.

Q. Was there one? A. No, sir. [325]

Q. It was just a talk? A. Yes, sir.

Q. Where were you when you had this talk?

A. If it was after we got the license, we had the talk about getting the men.

Q. Then you agreed you would operate these traps together? A. Yes—that is about the buoys.

Q. Was it agreed that you were to divide up the fish equally or was each man to take the fish he caught?

A. Each man was to take the fish that came in his net.

Q. And each was to pay one-third of the expense?

A. Yes, sir.

Q. Who was to pay the expense in the first instance—for instance in buying your net and getting the things ready requiring cash?

(Testimony of Erick Lindstrom.)

A. We had the money in the office, and Mr. McGowan and the bookkeeper sent for those things.

Q. But you had to get credit?

A. I had the money in the office.

Q. That was owing to you? A. Yes, sir.

Q. You started up business—bought new seines and got started? A. No.

Q. I mean two nets? A. Yes, sir, three.

Q. You had enough money owing you for that?

A. Yes, sir, we had enough money in the office.

Q. You say you at one time operated a set net on which location you got a ton and a half of fish a day?

A. Yes, sir.

Q. And since that time you quit and went to working for wages?

A. I did not hold the license; I was not in business myself; [326] I was with my brother Carl.

Q. Where?

A. Right across the river from Warrendale, called Wooder Creek.

Q. Were the nets in Wooder Creek?

A. No, sir, in the Columbia River.

Q. What is your brother doing now?

A. He is dead; he was drowned.

Q. What became of his set net locations?

A. The McGowans bought them; I suppose they had the ground leased, if I am not mistaken, my brother was operating the set nets.

Q. You were not operating yourself?

A. No, I was working with my brother.

Q. You were working for McGowan & Sons?

(Testimony of Erick Lindstrom.)

A. Yes, sir.

Q. And your brother owned the set net locations?

A. I cannot tell exactly whether my brother or McGowan.

Q. You don't know whether your brother was working for wages for McGowans?

A. He was working on shares.

Q. What sort of a place was this where you had those locations?

A. It was sort of an eddy along shore, and outside was the main stream.

Q. Now, sir, isn't it true that set nets can only be operated successfully in eddies?

A. Not necessarily; if you have a part of an eddy you can get out in the strong current.

Q. You must have part of an eddy?

A. Yes, sir.

Q. How long did you operate that set net with your brother? A. Three weeks.

Q. That is all the experience you had with set nets? [327]

A. I was set netting in the old country for a number of years.

Q. What country? A. Finland.

Q. What river? A. It is all rivers there.

Q. But what river was it that you were set netting in? A. In the Baltic Sea.

Q. What year did you come to this country?

A. 1888.

Q. What year were you born? A. 1867.

Q. Did you own a set net in the Baltic Sea?

(Testimony of Erick Lindstrom.)

A. I was with my father; I was in a boat with my father.

Q. And you came over when you were 21 years of age? A. Yes, sir.

Q. And the only experience you have had with set netting was three weeks in the Upper Columbia River? A. That is enough.

Q. Opposite Warrendale? A. Yes, sir.

Q. And that was the time in which you say there was no fishing in the lower Columbia River on account of the big strike?

A. That was the year 1896, yes, or 1906.

Q. And that was in the eddy?

A. Yes, but the current was running stronger on the outside of that net than it has ever run on Sand Island, but the inner side was an eddy.

Redirect Examination.

(Witness continuing:)

The launch that I spoke of as running from McGowan to Ilwaco was a cannery tender running only at the stage of high tide. It did not run at low water for the reason that there was [328] no water to speak of there—very little. That is the condition of the territory throughout there, it is all flats; most of it is up through the water; there is a little space one could wade across with gum boots on at low tide, in the lowest places; that is where there is least water.

The arrangement between McGowan, Coyle and myself was that we were to divide and apportion our expenses, and P. J. McGowan and Sons were to buy the fish at the market price.

(Testimony of Erick Lindstrom.)

Q. And it is a fact, isn't it, that they were furnishing the outfit in the first instance?

A. They were to, but we never got started.

Q. But that was the arrangement?

A. They were to send for it and have it on hand.

Q. They were to advance and provide the outfit?

A. Yes; any company generally does that.

Q. And they allowed you to do this?

A. Yes, sir.

Q. That was understood between you and your employers? A. Yes, sir.

(Witness continuing:)

P. J. McGowan and Sons is a corporation and but for the injunction suit in this action I would certainly have gone on and fished these locations.

Recross.

Q. Did you get any web for your net or web for any net which it was proposed to employ in operating any of these eight set nets?

A. It was just talked over, whether we would need it.

Q. And didn't you go and cut some of that web out? A. No, sir.

Q. You are sure of that? [329]

A. Not for that purpose; the buoys were taken out.

Q. You didn't cut out any web? A. No.

[**Testimony of H. S. McGowan, for Defendants**
(Recalled).]

H. S. McGOWAN, one of the defendants, being recalled for further examination in answer to interrogatories propounded to him, testified as follows: (Interrogated by Mr. DORR.)

I have heard part but not all of the testimony of the last two witnesses, defendants Coyle and Lindstrom. I heard that portion of their evidence referring to an arrangement they had with our firm concerning the locations and operation of these nets. I will state that whatever they did there and whatever they were preparing to do was with the knowledge and consent of our company. I allowed them to do this notwithstanding they were working for wages. There was no attempt on their part to do anything in the premises that would take any of their time that was not consented to by our company.

I remember the year 1896 which was referred to as the year of the big strike on the Columbia River. Fishing was going on all over the river all of that time during the fishing season. The strike probably made some difference because it disturbed the ordinary routine of operations, but the general fishing was going on. All the trap fishermen were operating in Bakers Bay as usual with the exception that they were operating under military protection from the State of Washington, and those gill net fishermen who felt disposed to take chances, and there were a good many, especially further up the river that operated, and they caught a good many fish in conse-

(Testimony of H. S. McGowan.)

quence, but our packing in the upper river was slightly increased that year, but not in a very great degree. I think our pack in 1896 in the upper river [330] might have been increased twenty or twenty-five per cent or thereabouts. We had a cannery in the upper river in the vicinity of Warrendale.

Cross-examination.

The gill netters that the union could not control were gill netting. I do not know how many there might have been; there might have been a thousand of them on the river. There are a couple of thousand on the river and there might have been half of them. I don't know whether half the gill net fishermen were fishing, but it brought into the fishing a lot of rough fellows who had not fished before. I think there was fifty boats out fishing during the strike on the lower Columbia River. The union patrolled the river. A good many fish were delivered to Cook's cannery at Clifton, and I think that cannery operated during that time. I am not sure but I think they were getting lots of fish. I don't know whether the Astoria canneries were operating during the strike, I know we and Seaborg was. Seaborg was in Astoria. I think all the canneries in Astoria tried to run during that time.

Q. As a matter of fact you went to Coyle and suggested to him to get these licenses, didn't you?

A. I don't know that I went to him; we talked the matter over of fishing out there.

Q. You were the man who suggested it?

A. I do not know that I was the original suggestor;

(Testimony of H. S. McGowan.)

it was quite awhile ago.

Q. You cannot remember that far back?

A. I can remember that far back, but I don't remember the details.

Q. But I want to know whether you went to Coyle and suggested to him that it was an opportunity to get set net locations [331] upon Sand Island?

A. No, I don't know that I went to him; there was more or less discussion.

Q. A discussion that you were the unsuccessful bidder? A. I don't know about that.

Q. Or that the Columbia River Packers' Association had outbid you?

A. I don't know whether that was mentioned.

Q. Did you go to Lindstrom and suggest to him that now was the time to get set net locations?

A. I don't know that I did; I might have mentioned that we get that location.

Q. Don't you know that it is very doubtful or very unreasonable that he would suggest such a thing when he himself was working for you?

A. No, I have had men working for me who suggested going into a proposition to fish, lots of times.

Q. Your idea was that he would keep on working for you right along the same as he had done and you would hire him to operate the set nets?

A. The idea was he would run his nets.

Q. He would quit working for you?

A. He would necessarily have to, after he got ready to operate.

Q. Did you charge him with the fish license?

(Testimony of H. S. McGowan.)

A. The accounts I do not think have ever been fixed, so as to divide them.

Q. Did you charge them to him?

A. I do not know; I did not keep the records. We had an understanding that we would bear our expenses together.

Q. Was there any charge on your books, or P. J. McGowan and Company's, against Lindstrom or Coyle for expense of keeping these two men down there? [332] A. I don't know.

Q. You would not know that?

A. My idea is that when the matter is straightened out to do business, we would divide up all of our expenses.

Q. But two years has gone by and no charge on the books therefor? A. Well, I don't know.

Q. Not to your knowledge.

A. Not to my knowledge.

Q. You are president and general manager of the company? A. I am president.

Q. And general manager? A. In a way.

Q. You have charge practically of all of the books?

A. I have oversight of the business in a general way.

Q. That is the only business you have?

A. No; I have other business.

Q. Attending to P. J. McGowan and Sons' business? A. I have other business.

Q. What?

A. I look after a great deal of private business of my father, and one or two of his companies.

(Testimony of H. S. McGowan.)

Q. That all comes from the company, contained in the family?

A. It belongs to members of the family.

Q. It is all handled from one general place?

A. It is all done at the same place.

Q. And all by the same bookkeeper? A. No.

Q. Do you have different bookkeepers?

A. We have two parts of the office.

Q. Is it all under one head?

A. No; except in a general way I look after the whole thing. [333]

Q. You have no office at any other place than at the cannery?

A. We have an office at Ilwaco and one at Warrendale.

Q. That is your cannery? A. Yes, sir.

Q. It is all controlled from the head office?

A. The general policy is.

Q. Statements are made there at regular intervals?

A. Most of the fishing operations were at the Ilwaco office.

Q. But the Warrendale cannery business is all reported at the head office?

A. Yes, from time to time.

Q. According to your system? A. Yes.

Q. Up around Warrendale do you have many set nets in operation?

A. We have, I think, about three that belong to the company, and *and* there are a good many others who set nets up there at different places.

(Testimony of H. S. McGowan.)

Q. Have you operated them lately?

A. They operate them every year.

Thereupon, the defendants rested.

On November 10, 1910, the taking of testimony in rebuttal on the part of plaintiff was resumed. The respective counsel for the parties duly appeared pursuant to adjournment.

[Testimony of Christ Hansen, Jr., for Plaintiff (in Rebuttal).]

CHRIST HANSEN, Jr., a witness called on behalf of the plaintiff, after being first duly sworn, on oath testified in response to interrogatories propounded to him as follows:

(Interrogated by Mr. FULTON.)

My name is Christ Hansen; I live at Chinook, Pacific County, State of Washington. Chinook is situated on the lower Columbia River, right across from Sand Island, probably [334] a distance of couple of miles. I have lived at Chinook for twelve years. My business is a fisherman. I have followed that business for twelve years. I have been fishing on traps for four years when I first came there, and since that I have fished with traps and seines both for eight years. I fished traps in Baker's Bay and seines on the south shore of Sand Island on the lower Columbia River.

Q. Have you had any experience in set net fishing?

A. What little set netting I have done, it is very little; I might have had a set net out to catch steel-heads.

Q. Have you observed set net fishing?

(Testimony of Christ Hansen, Jr.)

A. I have seen it, but not a great deal of set net fishing.

(Witness continuing:)

I am acquainted with the location of all of the five sites on the south shore of Sand Island. I have fished on No. 5, and have also fished on No. 1. I leased No. 5 from the Government once, and also No. 1 at one time. Before I leased my ground from the Government, I was seining on the south shore of the island for two years. It was on the ground that Chris Olson took up, and I also seined on ground that belonged to Sankala and Tom Gavin. I operated seines during such time, and all of the lessees of the Government operated seines for catching fish on the south shore of the island.

I have been acquainted and familiar with Sand Island for the last twelve years.

Q. Where are set nets operated when they are operated?

To this question, counsel for defendants objected on the ground that the witness had not shown himself competent to testify.

A. There are so few set nets operated on the lower part of the river that as far as I know I am not very much familiar with them, but from what I have heard they are operated more or less [335] in eddies.

Q. Are there any operated in the waters of the Lower Columbia River in any of the currents or channels?

A. Not that I know of; I don't know of any set net locations there. If there were any set nets oper-

(Testimony of Christ Hansen, Jr.)

ated in the lower Columbia River, I would know it.

I saw a set net operated for steelheads in the Chinook River once, in near where we live, close by the island. I watched how they were worked, and I am familiar with the manner in which they are operated.

Q. Where are they operated with reference to the character of water and current and the like of that?

To this question, counsel for defendants objected on the ground that the witness has not shown himself competent to testify. By agreement between the respective counsel, it was agreed that the above objection should run to all of the above class of testimony from this witness.

A. The set nets I have seen operated on the lower Columbia River is along the Chinook beach. There have been set nets located there in the winter time for catching steelheads and that has been in shore and out, and some have been made fast way up on the shore and then fastened to trap piling out in the bay, and run up and down. There is no eddy there, but there is a little tide running one way or another.

(Witness continuing:)

The web used in set nets is the same as used in gill nets. I operated seines on the south shore of Sand Island for eight years, and I am acquainted with the current in front of the island, and I am also acquainted with gill nets and the manner of their operation.

I saw some of the buoys that McGowan, Lindstrom

(Testimony of Christ Hansen, Jr.)

and Coyle [336] placed in front of the south shore of Sand Island. So far as I understood it, they were placed by some other parties, by Stensland and a man by the name of Bussey. That was in the spring of 1908, sometime in the latter part of June. I should judge these buoys were about one hundred fathoms from the shore; I never measured them; that is my judgment, that is, one hundred fathoms from medium low tide.

Q. Supposing that a set net built accordingly as an ordinary gill net is constructed, were placed in front of Sites Two and Three, one end anchored at one of those buoys you saw out there, and suppose the buoys were only about one hundred feet from the shore and the net about three hundred feet long, and anchored to another buoy still further out from the shore, about three hundred feet out from the inside buoy, what effect would the current have on that set net?

A. Why, I should judge that most of the time the current would pull that net under. I have had lots of experience with that. We have been caught with a seine there, where we caught a snag, and had perhaps a couple of teams on the tail end holding it, and that seine would go under the water, cork, lines and all. You could only see it a little ways from the shore, and the balance would be under water.

A seine will catch a little more water than a gill net, of course. I have never seen a gill net caught down there.

Q. During what period or what time in a given

(Testimony of Christ Hansen, Jr.)

twelve hours would this net be covered with water or dragged under?

A. It would on Sites Two and Three from the first of the ebb, for about three hours it would be pretty hard for any gill nets to stand any way for fishing, and then it is a very little time until the tide turns there and comes back again with a pretty heavy current in shore and downstream outside, and at that time that current will not run quite as strong as [337] the ebb tide, but quite strong—strong enough to submerge the net, and then there would be a little slack on towards low water, and then in a little while on the first of the flood.

The time this slack water would be maintained depends upon the tides. There are tides that this water will stay slack for a little longer time than others. At other times, the tide would not stop for only about a half an hour or twenty minutes, or it might be an hour. The tides vary greatly there; it is according to the weather, storms and tides and things like that. You cannot figure on the tides along the island as you can further up. I should judge, a fair average time day in and day out, when the tide would be slack, would be between an hour and an hour and a half. That would be at low water. There would be a little time also on high water. At high water, I think the average would be an hour, something like that.

You get very little fish along the island at low water; we get most of our fish on the first of the flood. It is very few gill netters that pick up at low water,

(Testimony of Christ Hansen, Jr.)

but generally I know it has been flooding some when they get fish on low water. I should think that most of them if not picked up when they were caught, when they struck the net, the tide would be strong enough to tear them out of the net. I don't think that many could be saved unless they were picked up right there. There is quite a bit of current—quite strong; a strong current on the flood, too. There is no time when there is absolute slack water either on the top or at the bottom. Sometimes it will ebb pretty strong underneath and be flooding on top.

During the twelve years that I was fishing on Sand Island, I never knew of anyone attempting to employ set nets in front of the island other than those McGowan attempted to use.

Q. State whether or not in your judgment a set net placed where Mr. McGowan and these men, Lindstrom and Coyle, placed theirs, [338] or indicated where they would place them, would catch any salmon fish.

To this question, counsel for defendants objected on the ground that no sufficient foundation has been laid to entitle the witness to answer the question, and that he would be incompetent.

A. I think a set net at any place in the Columbia River would catch fish; I think they would catch fish.

Q. What do you mean by that?

A. I should think a man could put out a set net in the river anywhere the fish run and he would be able to catch fish.

Q. How many fish would he be liable to catch with

(Testimony of Christ Hansen, Jr.)

eight set nets in a season, in your judgment, carefully attended in every way, giving the best possible attention, operated by skilled men?

A. Before I answer that I must ask a question.

Q. Yes.

A. Do you mean if those set nets were fished for the term of the season?

Q. Yes; set nets three hundred feet long.

A. Fished for two months?

Q. Yes, anchored one buoy inside and one buoy out, fished properly by skilled men and attended to by skilled men, how many fish in your judgment, with proper set nets?

A. I would answer that this way: Whenever those set nets were put there to fish in the daytime, in the clear water, I doubt if they would catch any; that is in clear water in the daytime, I doubt if they would catch any fish. And if they were placed there in the night-time with clear water they would not do very much because they would be full of fire, and the fish would see that almost as well as in the daytime. By fire, I mean phosphorus. That acts like fire on the net. And if it was muddy water they would perhaps catch a few fish [339] in the daytime, if they were attended to and picked up on the slack tides, on low and high water, and perhaps the same in the night-time, if they were to pick them out. If they had a set net for big salmon and a spring tide came, he would be likely to get out, because steelheads will do it, and I think the salmon would do it outside of Sand Island in that current.

(Testimony of Christ Hansen, Jr.)

Q. About how many fish do you think these eight set nets would catch?

A. That is hard to say; it has not been tried.

Q. But I would like to have your judgment as to whether it would catch enough to salt down for one family for a year, and not a big Roosevelt family either?

A. My judgment would be that if I had those set net locations and fished them for my own use, I do not think it would pay me to fish them at all. So I cannot say any amount of fish to be caught.

Q. Do you think they would catch any fish at all hardly, to amount to anything; would they catch a ton?

A. That is pretty hard to say; I don't think they would really.

Q. Is there any other reason why they would not catch fish; could they be maintained; could the nets be maintained at those places during the fishing season? A. No, I don't think they could.

Q. Why?

A. Because there are so many gill netters along there, along that island, who come in the night-time and drift back and forth, hundreds of them, along the outside of that island. I don't see how they could be maintained amongst those gill netters.

Q. What do you mean by that; explain that?

A. The gill netters will certainly drift by those locations, and [340] another on top of him, and another on top of him again, and their nets would get all tangled up, and you can imagine what would

(Testimony of Christ Hansen, Jr.)

become of that; they would not stand it.

Q. You mean that the gill netters drifting up and down that channel there, with their nets, would drift on top of those buoys?

A. Yes, on those set net locations, that is to where they were made fast, and also to the nets.

Q. And you say there are hundreds of gill nets habitually drifting up and down that place where those set nets are? A. Yes, sir.

Q. And how long do those gill netters use that ground as a gill netting ground?

A. They use it from the opening of the season until the end of the season; they are gill netting there all season through more or less, but the middle and latter part of the season most. It is rough water down that way and they will not risk it early in the spring; but there are some there just the same.

Cross-examination.

(Interrogated by Mr. DORR.)

The steelhead I spoke of is a certain kind of fish that we are catching down on that part of the river similar to a salmon, and they are classed with salmon. They look like a salmon, but are generally smaller than a salmon. The average is smaller than that of a Chinook salmon. In the spring, their average weight is from 8 to 12 pounds, something like that, 12 or 14 pounds; in the latter part of the season, they will average more, and some go as high as 30 or 35 pounds. They run about like salmon, although there are not so many of the big ones. Chinook salmon will go as high as 70 pounds, I think, but

(Testimony of Christ Hansen, Jr.)

those are very rare, but you get lots of them at 40 and 50 pounds. Sometimes the run of fish will average small and sometimes bigger. The [341] Chinook salmon run all the way from 10 pounds up to 70 pounds, not many up to 70 pounds, as I have said before. There is not an awful lot of these steelheads that will run 35 pounds either. I should judge the steelheads average 16 pounds the whole year around. I should judge that steelheads are not as abundant in the river as Chinook salmon. The proportion of fish that would be steelheads as compared with Chinook salmon differs in different years; some years it would be perhaps a quarter and some years a little more.

Another variety of salmon in the river is called "bluebacks." They average from 4 to 5 pounds. I think these are the three fishes that we figure on catching. There are also silverside salmon down there in the fall of the year. They run as high as ten pounds, I guess. Some years there are quite a few and some years not so many. They are also fished for. The set nets I observed were operated off shore from the town of Chinook. I should judge, there are a half dozen, or something like that, operated each year. They are put out after Christmas, in January and up to the close of the winter season, and they are generally fishing for steelheads. These fish gill the same as other salmon. They are small set nets, most of them along the Chinook beach are operated by small boys, young boys; they couldn't be very long; say 12 or 14 to 20 fathoms, just pieces

(Testimony of Christ Hansen, Jr.)

of shallow gill nets. They are made specially, most of them; they are a small fish net, with lead and cork line, and anchored at each end, and fastened to the shore, or off shore, so long as they are fastened at each end.

We operated seines on Sand Island at almost all stages of the tide, excepting when it is running strong. We operated in high water and up to two or three hours on the ebb and then quit for awhile and start in close to low water and seine as long as we can on the flood. If the weather is good, we could seine [342] probably some days perhaps five hours and sometimes six and sometimes more, differing in different days, and according to the tides. We cannot seine on a strong tide. In laying these seines out, we go out in the track of the gill netters that drift down there; they come down every day, and get tangled up with the seines a good many times, and we have lots of trouble with gill netters. If it was not for them, we would catch lots of fish in the seines. We have to look out for them. When they come, we have to get out of the way it seems to me; I always do. I tried to lay out there between them when I can. There is no eddy in front of Chinook. The tide is not so strong. Chinook is laying inside of Sand Island. I am not sure but it is two miles. The tide ebbs and flows there. The current is not very swift there; it is very seldom so swift but what the corks will show at any time, either ebb or flood; it is not swift enough to take the net under water. I am sure of that, that is, where

(Testimony of Christ Hansen, Jr.)

they place the nets. If they placed them further out of course they would but where they place them pretty close to the shore, most of them make them fast on the shore. They catch steelheads there not a great deal; sometimes two or three per day, and sometimes they fish a day or two and don't catch any; sometimes four and five in one night; very little in the daytime. They are not out of the track of the fish; of course, steelheads run close in shore. They see the net in the daytime and don't gill as they do in the night.

The character of the water around Sand Island depends upon the time. In July and August, this year, it was clear water pretty near both of those months. I think there was a little muddy water in July, but very little. We had more muddy water in 1908, and I think in 1909 through in July. Of course, August is nearly always clear, except in years when there are cloudbursts. We hardly ever have any clear water until about [343] the first of July, sometimes not until the middle of July. Every year has some clear water; the flood tide is nearly always clear. We have no years when we have muddy water all summer. Phosphorus comes only when the water is clear. Perhaps the moon has something to do with it, but when the water is salty and clear, it is fiery when you put your oar down or anything in the water, it is like fire. It is more in some portions of the month than others.

At the time I saw the buoys out there, they were placed up and down along; I have not ascertained

(Testimony of Christ Hansen, Jr.)

just how many. I had not got out of the island with my seining outfit at that time. I was looking over my grounds and saw them placed a little ways out from the shore, I thought about 100 fathoms or 75 fathoms. They were all below low tide. I do not remember the time when I first saw them. I saw Iver Stensland and Bussey there in a boat one day. They were around the buoys; it looked to me like they were working with them. I could not say whether these buoys had license numbers on them or not. I never was out to them. I am not sure about the time I saw them, whether in the month of June or July. It was before the Columbia River Packers' Association came down there. I never saw any set nets operated in front of that island before; neither did I ever see any traps there. Traps were down further in the Oklahoma Channel, but they are now covered with sand and in the island proper. I was seining on my own accord. I had no relation whatever with the Columbia River Packers' Association, but I was selling my fish to the Columbia River Packers' Association, and they were not interested with me in any manner. They furnished me some gear and capital; I don't remember if they were furnishing me. One year I ordered gear through them for my seines through Mr. Hawkins. [344]

Redirect Examination.

(Interrogated by Mr. FULTON.)

Steelheads will not ordinarily gill in ordinary gill nets; the fish are too small. When I speak of the average salmon, I had reference to salmon caught in

(Testimony of Christ Hansen, Jr.)

seines. So far as I know, I have not operated a gill net, but I have heard that they do not catch many steelheads for the above reason.

[Testimony of Jens Nielson, for Plaintiff (in Rebuttal).]

JENS NIELSON a witness called on behalf of the plaintiff, after being first duly sworn, on oath testified in response to interrogatories propounded to him as follows:

(Interrogated by Mr. FULTON.)

I live at Astoria, Oregon. I first came there in 1884. I have lived there over 21 years—since 1888. When I first came there, I started in fishing, then I left and came back again. I am fishing in the summer and doing carpenter work in the winter most of the time. I have been fishing since 1884 on the Columbia River from Rainier down to the mouth of the river. During that time, I have been operating a gill-net, except one fall when I fished for about a month operating a fish-trap, but I didn't get any fish in it. I have tried operating set nets up in the river near Rainier and Mt. Coffman. I went up there in the spring, started the first of April and stayed up there generally during April. I did this for four or five years. Later years, if I did not get any fish at first, I went right back. I have had occasion to examine into the manner in which set nets are operated and can be operated. I have tried to operate myself and saw others, and I tried every year for four or five years, and I gave it a good fair trial. My operations were confined to the waters of

(Testimony of Jens Nielson.)

the Columbia River, in the vicinity of Rainier, and a little below Rainier. [345]

Set nets, where they are operated successfully, so far as I could see, was in eddies, where there is sharp points coming out with the strong current, and forces the water out, and that makes an eddy. In 15 or 20 fathoms of eddy, the net would stand there all the time and get fish, but mostly steelheads, but I could not get into the eddies, because they were all taken. I tried it between the snags, but I couldn't get any, because if they got in, the current took them away. I set many nets, but I didn't succeed. In a strong current, the net will go under the water, or if it comes lengthwise, it will draw up, so that it lays flat and the fish don't gill, if you have a strong current. I tried set nets around there where there were snags, but I couldn't catch fish. I don't know the reason; there was muddy water in the daytime, but I couldn't get any.

I have also operated gill nets in the Columbia River, and the ordinary size of the mesh of such nets range from seven and one-half to nine and one-half inches, and some have nine and three-fourths inches. In the spring-time when the fish are small, the average mesh is about seven and three-eighths to eight inches. The majority, however, I think are about nine and one-fourth inches. These gill nets are about two hundred and forty to two hundred and sixty fathoms in length. Out in front of Astoria, on the flats, they make them a little longer; they don't go much below two hundred and forty fathoms.

(Testimony of Jens Nielson.)

The cork line is the rope on which is strung wooden corks, which float the net, and on the other side of the net is a rope on which is welded or molded lead, and this keeps the net practically upright.

The principal drift on the lower Columbia River is along the south shore of Sand Island, and gill nets up to two thousand in number ordinarily use that drift every year.

The way gill nets are operated there is, they are generally laid out from deep water to the bank. There might be one strikes [346] something, and another will come and they will swing together, but generally they have a little distance between them. They are laid out, of course, according to the tide; they drift on the beach called Coyote beach. They lay out a short piece and drift down and take her up and go back. This is generally done in the spring-time. The length of the drift ordinarily employed is about a couple of miles along the island. There are at least five hundred or six hundred boats every day along that island and at night-time.

I am familiar with Sand Island, but I am not exactly familiar with the number of the sites. I have never examined the numbers on the ground, but I am familiar with the ground, and have been familiar with it since 1884. I fished there every season. I know the location that the Columbia River Packers' Association seined on at Sand Island during the years 1908, 1909 and 1910. I saw some buoys that were put out there in front of such seining grounds in 1908. The first time I came to know they were

(Testimony of Jens Nielson.)

there, I went down in the evening and came out with my net, and got fast to them and lost thirty or forty dollars' worth of net on those buoys. I started in a strong current and went in and struck those buoys. Of course, I did not know what it was; the net started to rip, and I got fast, and they tore off. I went a little further up and got in again, and another fellow got on top of me and we dragged together up to the lights, that is the lower lights, and then they tore loose, and I lost about one hundred dollars. I went back and only saw a few seine nets and some corks. I saw we were fastened to the buoys, and I spoke to some of the others about it, and we thought of getting out a petition to the Government to remove them, and we would have to remove them, but I thought the Packers would start seining and would see them and remove them. If the Columbia River Packers' Association had not removed them, of course, we would have to remove [347] them, because lots of fellows lost nets there. At the time I met with this accident, my gill net was about two hundred and forty fathoms in length and about four and one-half fathoms from top to bottom. When our gill nets came in contact with these buoys the corks went under water; of course, the strong current had hold of my net. I could not get rid of the buoys; my net took them all down; it was on the strong flood tide, and we always go into the beach to swing the net against the bank. My entire net went under so far as I could see; of course, it was dark. It would almost take the whole thing under. The

(Testimony of Jens Nielson.)

force of the current sunk my corks and net almost to the bottom, so that I could not see what I had run up against.

Q. Supposing a set net 300 feet long was placed in front of Sand Island where the defendants' set nets were placed, anchored at each end to the buoys that were there, state what the current would do, what effect the current would have upon a set net so located?

A. According to the tide; at times it would take it under water most of the time. If it stood lengthwise the meshes would go flat, and crosswise it would not fish. In order to fish it would have to be across the current, and if it was laid parallel with the current it would not gill the fish. Most of the time the corks would be down under the water, and the meshes of the net would be taut, and I don't get any fish that way, except at a snag. I have tried it in there in the daytime in the bay, and never could get any fish. There are lots of gill nets laid out along the beach, because there is no tide, but they never get fish. If we could, we would be lying there all the time. Fish will run at low water, but not in the dead tide. In slack water, they will run in deep water, because there is always a current; when it is flooding on top, there is a strong current underneath, but in the dead water, the fish stand [348] still; they don't run, even if they touch the net they will not gill; they will stand there. I don't think a set net there would catch fish at low slack; I don't think a set net would catch fish there at any time. I have

(Testimony of Jens Nielson.)

been trying it in all ways. I have seen the seine haul them in by the ton, but I could not catch anything in the net.

Q. What effect would a strong tide have upon the fish that would happen to be gilled in a set net in this location? A. It would tear them out.

Q. Why do you say that?

A. I can prove that. There is a wreck called the "Republic," it contains thirty fathoms between the two side wheels; you can see the nets across there, but I don't think a man ever saw a fish in them; I have looked lots of times but never saw a fish in them yet; if there is a fish in it, it is a flounder.

Q. Are you familiar with the value of sites on the Columbia River?

A. If a man has set net location—you cannot get them, because he uses it mostly for winter fishing for steelheads.

Q. Do you know what they are worth?

A. No, I never asked.

Q. Well for spring or salmon fishing?

A. I never got much spring salmon in a set net. I only know of one fish caught in a set net that was in front of the cannery; they most get steelheads, if anything.

Q. Well, whether steelheads or bluebacks or salmon, what would be the value of those premises in front of sites *were* the Columbia River Packers' Association was operating seines in 1908, 1909 and 1910 for set nets?

(Testimony of Jens Nielson.)

A. I don't think they were worth anything; I would not buy them; I could make set nets out of gill nets, but they would not catch fish; it would not be worth anything in my judgment, if I had all the privilege there I wished. [349] I don't believe it would catch any fish. If I did have a set net, I don't think it would stay, because the gill nets come right over it, and I do not believe a set net would catch any fish even if the gill nets did not go over it.

The average weight of a salmon caught by gill nets is $22\frac{1}{2}$ pounds or 23 pounds, take it right through the whole season. Gill nets, say $7\frac{3}{4}$ mesh, will catch a fish 11 pounds, mostly $12\frac{1}{2}$ to 15 pounds and up to 18 and 20 pounds. The ordinary gill nets never catch fish weighing less than 18 pounds; they might get one weighing fifteen pounds, but that is seldom.

My experience in the last twenty years fishing on the Columbia River is that I very seldom catch steelheads in a gill net. I don't think I have had 300 pounds of steelheads when I had ten to fifteen or eighteen tons of salmon fish in a year.

I have never known of any set nets being operated in the vicinity of Sand Island. The only fishing gear operated on that shore, to my knowledge, has been seines and gill nets. Once many years ago, someone started to drive a trap, but as fast as they drove the piles the fishermen pulled them out. They drove some back of the "Republic," but it filled up dry with sand. They fished that one season, and I think that is about all. I would not say what fish they caught.

(Testimony of Jens Nielson.)

Cross-examination.

(Interrogated by Mr. DORR.)

The average length of gill nets used on the Columbia River is from 240 to 260 fathoms, and about four to four and one-half fathoms in depth. The net does not go straight down, because it is weighted heavy enough. What I meant by swinging the bank is that we start in deep water and go to the bank; we pull right up around the bank, and we let the net swing against the bank, and the fish start and go around and get into the net and gill. That is what I was doing when I got tangled in these buoys. I started [350] in deep water and pulled into the beach, that is, pretty close to it, as shallow as I could navigate my boat. When it is smooth, we get pretty close, and we swing a buoy on to the beach and pull out, and let it drag down the beach.

Both Oregon and Washington licenses are good on the river for gill net fishing. I said there was one thousand drift nets in that vicinity; there are more than that when we fish all over the river, but there I would say, in the latter part of the season. In May there are five or six hundred; and in the months of August and July, there may be one thousand boats, with two men to a boat generally; sometimes a man might go with a skiff and drift along. I say the cost of these gill nets, if a man had to pay for all labor, he would not start out fishing in the spring with a net for less than four hundred dollars. If he bought the net, all new twine, it would cost him about \$400.00. The average catch is from four to five tons. I said

(Testimony of Jens Nielson.)

that I caught twelve tons, but that is not the general average. I am one of the highest. I used to be the highest, except the last two years. A fair average would be not more than three or four tons, but I get three or four times as much as the average. The boat investment is entirely separate. When new, a bare boat costs \$225.00. My boat cost me \$250.00; that was a sailing boat. With the sailing boat, the investment stands about \$650.00. Gasoline boats cost \$500.00. I have been speaking of Columbia River sailing boats. Sometimes a gasoline boat is the best; they are easier to work. I don't know that they will catch any more fish, but it is much easier to get home with.

I was fishing with set nets down abreast of Mt. Cauffman; that is just below Rainier. I fished there four or five years, and I usually operated two set nets, but sometimes when I saw I did not get anything, I did not attend to them, and while I was operating set nets, I was also operating gill nets. When you set [351] net, you leave it on the slack tide, you don't need to stay with it and watch it. Between times, I gill netted. I gill netted at night; you cannot catch fish in the daytime when the water is clear. In the daytime I sleep and mend nets and so forth. This is the custom when the water is clear. I mean to say that you cannot catch fish with a gill net in the daytime when the water is clear. We do have this phosphorus to contend with at night, but it is not present at all times. It occurs mostly when there is a southerly wind; and after the wind comes when there

(Testimony of Jens Nielson.)

is rain and fog, you don't see it, and in the latter part of the season you don't see it, as I have noticed. The full moon has something to do with it. It occurs at full moon when there is a strong flood. Of course, it don't occur in fresh water; only occurs in salt water. It occurs around Sand Island when the river is low, and in strong flood, when the water is salty, and its extent up the river depends entirely upon the state of the river. In the spring, we have no flood up where I was set netting. It might back up but never flood the net up river. I caught no fish with my set nets, although I worked four seasons at it. The reason I kept it was I got fish with my gill net in April. I never caught any fish with a set net. I had plenty of net, and I would try it to see if I could not catch them a little easier. I went and looked at my set nets every day when I had them out. I thought there might be one, but never got any. I did get one down abreast of the town. It might have been a little later that I got this. I generally tried it, but I did not get any, because I could not get into the eddies; they were all taken up. People operating set nets in eddies got steelheads; some days they would get some and some not. They would set their nets out and they stayed there. Of course, they attended to them. The current was always slack in the eddy, and there was no flood, that is, so long as the net was not too long. [352] The only place you can fish with a set net is in an eddy.

Q. When you do set them in an eddy, it is impossi-

(Testimony of Jens Nielson.)

ble to catch any, because the fish don't gill unless there is a current?

A. Well, the eddy is different from the current.

Q. But you have explained that fish won't go into a set net unless there is a current; that they won't gill?

A. Well, an eddy, or eddy water is quite different; there is no tide. Where there is an eddy the nets stand in the eddy, and the fish want to go clear of the strong tide and they go in the eddy. The steelheads will follow the eddy. They are different from salmon.

Q. Will the steelheads or any other fish go into a gill net where there is no current? A. No.

Q. Then they won't get in in an eddy?

A. Yes, that is not dead water; that is always running.

Q. You didn't try it in an eddy?

A. No, I couldn't get in.

Q. The difference between an eddy and the current is that it runs in a circle?

A. The current strikes a rock and comes back and out again, and the net is right in the eddy.

Q. So that there is a current all the time?

A. Yes, sir.

Q. Did I understand you to say *something* a set net down at the "Republic" wreck?

A. They are in the line, and get onto that wreck. That is like a snag, and it is an old steamer that was wrecked; that tears the lines.

Q. I thought you said there was a set net there.

(Testimony of Jens Nielson.)

A. I said they will stand there like a set net, and then the next tide turns and tears them away. But you can find them when it is like a set net over the wheels. [353]

Q. Then your idea is that the gill net fishermen would not allow these set nets to be operated in front of Sand Island? A. I don't think they would.

Q. They would take them out by force?

A. We intended to sign a petition to the Government and remove them from navigable water, because they were in our drift. I went along there with the tide. If I had had money, I would have sued McGowan, but I didn't have it.

Q. Where did the fishermen pull the piles out as fast as they were driven in; did they have a permit?

A. Well, that was so long ago, I don't remember. Those men are dead and gone now. They tied ropes on and pulled them away. I don't know who did it; I could not say; that was many years ago.

Q. They turned the pile-driver adrift, did they?

A. Oh, no.

Q. How wide is the river at this place from Sand Island to the other shore?

A. I suppose four miles; some places six miles.

Q. They drift all over the river?

A. Mostly; that is where they go; in the strong current they cannot drift in the deep water.

Q. It is not absolutely necessary for them to drift into Sand Island beach?

A. That is the only place they can drift on strong current; that is the only place. If in a strong cur-

(Testimony of Jens Nielson.)

rent, you were out in the deep water, you would be outside the bar in fifteen minutes.

Q. What kind of a current is it along the island?

A. There is quite a current but we don't use much net; just a few fathoms; take half an hour to drift a couple of miles; and then pick up and go back.

Q. How far is it from there to the bar? [354]

A. To the mouth of the river, it might be three or four miles.

Q. How far out do you go fishing with a drift net?

A. In the latter part of the season we often find it calm water and go pretty well out to the bar; some go out just for the sport. If it is rough, of course, they never go out there; they never go further than Sand Island.

Q. Sand Island is about the limit?

A. Yes, until the latter part of the season.

Q. How far up the river do they go?

A. I think right up to the Dalles; I can't say; up to Rooster Rock.

Q. Up above the Cascade Rapids?

A. I have never been above Rainier.

Q. How far is that?

A. About sixty miles; forty-five or fifty, along there.

Q. What is the difference in the current up at Rainier?

A. The current runs down all the time, quite a strong current in the spring; I cannot say later in the season.

Q. You were there in April?

(Testimony of Jens Nielson.)

A. Yes, we used to.

Q. What is the strength of that current up there?

A. I cannot answer that.

Q. Is it swift and rapid or slack and slow?

A. It is a strong current; in some places the sailing boats cannot make headway.

Q. Is it as strong as in the main river between Sand Island and Astoria?

A. Yes, in certain places. There were many who did not like to go there because it was full of trees, but I did, and that is the reason I got a good many fish. [355]

Redirect Examination.

(Interrogated by Mr. FULTON.)

Q. The places where you had your set nets in the vicinity of Rainier, how did the current there compare with the current in front of Sand Island where these buoys were?

A. That is quite different. There was a kind of a tide but in the spring I set in between some old tree stumps; sometimes there was a kind of an eddy behind the tree.

Q. That is where you set your net, the current was not very strong?

A. Not very, although sometimes it was.

Q. How would that current compare with the current where these buoys were put?

A. I could not compare them.

Q. Which was the swiftest?

A. It was swifter at Sand Island, that is, at certain time of the tide.

(Witness excused.)

**[Testimony of John Ostervold, for Plaintiff (in
Rebuttal).]**

JOHN OSTERVOLD, a witness called on behalf of plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is John Ostervold; I live mostly about two miles above Clifton, in the Columbia River. I have been acquainted with the Columbia River since 1881. My business is fishing. I have followed this business all my life; ever since I have come to the Columbia River. I have fished on the Columbia River since 1881 with all kinds of gear. I fished with gill nets around Sand Island, and have operated set nets around Bugley Hole and Locaman and all along the river. I have also followed [356] seining. I have a seining ground of my own. I have been seining since 1887, and have been seining for the last sixteen years on the Columbia River. I engaged in set netting for the period of ten years, first from 1884, when I located on Puget Sound; ten years set netting off and on, every winter. I have given the matter a very thorough study, and have investigated how other people operated set nets. So far as my experience goes and that of others, set nets can only be operated successfully in an eddy, the length of the net to fit the eddy. If you have too short a net, it will not fish good, or if you have too long a net, it will not fish good; the net must fit the eddy. The eddy I speak of is formed by a promontory from the shore, and it cuts

(Testimony of John Ostervold.)

the current and makes a whirl, or back whirl, next to the shore, and follows down along the rip. Sometimes you can put up three or four nets in one eddy, the closer to the rocks you are, the shorter the net; if you get fifty feet further down, you could put twice as long a net down, and still longer further down. Of course the eddy dies as you get further down. Sometimes the lower net may do best and sometimes the upper. The reason a set net cannot be successfully fished in any other place, is because in the eddy the current is always live and it keeps flapping the net back and forth; more so in an upper eddy, and still less in the lower one; that stands the steadiest. The reason why you cannot successfully operate a set net in a straight current is, because there is no eddy there; the current is too strong; there is no slack water.

Q. Then if you were to take a set net down where the tide ebbs and flows, there is always a slack water at both low and high; can a set net be successfully operated there?

A. On the slack, it would be so short a time you would not have time to handle your net, before it would turn again. You must take your fish and wash your nets or it will spoil in [357] about two weeks. I am familiar with Sand Island and have gill netted there.

Q. Can a set net be operated in front of Sand Island about the middle portion of it, the inside portion of the net being 50 or 100 feet from the shore, and the outside at whatever length they wanted?

(Testimony of John Ostervold.)

A. Not in my days; I have not been there since 1893. I have heard the testimony of Mr. Nielson and heard his description of the current at Sand Island, and I heard him describing the island as it is to-day. From his testimony, in my judgment, set nets could not be operated successfully there. It must have its own way of doing the work, coming and going. If you had bridles at each end in a hammock net, right in the strong current, it would bring the lead and cork line together. If you had a lot of rock tied at the bottom to the lead line, it would lay over that way with one tide, and over this way with the flood tide, that is, the cork line would go down to the bottom of the flood and down the other way on the ebb tide. At low-water slack, it would probably catch a fish or two, if you could spare the time looking after the net. Fish run at times at low slack. Salmon generally come outside on slack water. If a set net were located within 400 feet of the shore of Sand Island, they would probably catch a few salmon. I think they run that close to the shore, but I think that at slack water is the time that they must fix the net.

Q. From the description you heard by Mr. Nielson of this location down there, what would be the value of that location for set net purposes?

Mr. DORR.—That is objected to as incompetent, and no foundation laid.

A. I would not give five cents for any such location without an [358] eddy; it is not worth it.

Q. Referring to slack water, you say that a set net down there in front of Sand Island might catch some

(Testimony of John Ostervold.)

fish, but that would be the time you would have to take it up? A. Yes.

Q. Otherwise you would have no opportunity to pick it up? A. Yes.

Q. And therefore you could not catch any fish as a matter of fact? A. I think that is true.

Cross-examination.

(Interrogated by Mr. DORR.)

I have never been over on Pillar; the piles are too close together there. I have heard about it. They drive piles and stretch nets between the piles and hang them slack, but I was never there, only what I have heard. I have heard it is a swift current and shallow water, and that they drive piles about every six feet, and then it is practical to catch fish where there is some current, if you fix them like that, have the right kind of protection, so that the current does not keep them too tight, and put suitable sticks on the net, to keep the web in proper place and to keep the current from getting too much strain on it, and you must not have them too far apart. This, of course, is regulated by the swiftness of the current.

I have fished on Sand Island with a gill net. My business now is seining, and I sell my fish to the Columbia River Packers' Association. I am independent; Columbia River Packers' Association is not interested with me; they are backing me. They furnish me the gear. I am operating the seining ground on the lower end of Puget Island, abreast of Cathlamet, about 33 miles up the river from Sand Island. I am operating in the State of Washington. The set

(Testimony of John Ostervold.)

netting in eddies is mostly in Oregon, in the vicinity of Jim Crow Point. There are perhaps two thousand [359] set nets in those eddies, but I have quit. They still operate there; they also operate some traps. The set nets are mostly operated in the winter. They don't operate in the summer, because they can't get the Chinook salmon up into those small eddies.

Redirect Examination.

(Interrogated by Mr. FULTON.)

Q. In your judgment could a set net be successfully operated down there in Sand Island regardless of how it was constructed, even if piles were driven?

A. I don't think piles would do any good there; it is too swift and too deep. I can't imagine any way to construct a net to be successful on Sand Island.

Q. Suppose they put it down in ten or fifteen feet of water close to the shore?

A. If the fish went like that, they might be caught by scoop net perhaps.

Q. But could it be operated successfully with a set net? A. No; the fish don't go that close in.

Q. Then you say the set nets you know of on the Columbia River do not catch salmon at all, but simply steelheads?

A. Yes, sir; I never saw them catching any Chinook salmon to amount to anything. They might get one, but very seldom. I have never been up the river around The Dalles or Warrendale.

**[Testimony of M. Lugnet, for Plaintiff (in
Rebuttal).]**

M. LUGNET, a witness called on behalf of plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows: (Interrogated by Mr. FULTON.)

My name is M. Lugnet; I live at Ilwaco, Washington. I came to Ilwaco in 1883. I have lived in Pacific County in the State of Washington for the last 27 years. First I was engaged [360] in fishing, and then I went and took up a homestead, and then I have been logging, and fishing again of late years. I was rafting and have done carpenter work in the last summer. All the fishing I have done was gill netting. I fished four seasons, then I was away for six or seven years, and then fished three seasons again, then was away again, and then fished four seasons, making twelve in all on the Columbia River. My fishing operations extended all over from opposite the bar up to Moglers Station, abreast of the City of Astoria, and I have been successful. At first I fished most on the north side of Sand Island, and on the south side some, but seldom. Of late years, I never set my net on the north side at all, but on the south side. I could not tell how near the shore; anyway I could get my net; there were so many nets I had a hard time to get my net out. I could not tell how many nets habitually fish the waters of the lower Columbia River, in the vicinity of Sand Island. It looks to me there were lots of them. You could walk from one boat to another almost across the river.

(Testimony of M. Lugnet.)

I am acquainted with the place where the Columbia River Packers' Association seined on Sand Island during the years 1908, 1909 and 1910. I heard that they leased it from the Government. I know about where it is; I saw them there. I saw these buoys that McGowan, Lindstrom and Coyle put in front of the Columbia River Packers' Association's grounds. There were some stakes hanging up there; I do not know what they were or who put them there; I saw them there, in 1908. I could not say how many there were; I never counted them, but I saw three or four, something like that. I saw them on ebb tide. The buoys were floating at that time. If they had not been floating, I could not have seen them. I did not see them at a strong tide; I never got hung up on them.

Q. How were they placed with reference to the locations where [361] the gill netters drifted?

A. The gill netters that I saw when I was there the last four years, I thought I had laid my net where I had a chance to get my full net out.

Q. Was it in the drift ordinarily employed by gill netters?

A. They were supposed to be gill netting, drifting with the tide.

Q. And was that in the drift where these buoys were?

A. Well, they might drift on them, although I never did.

Q. Would you say it was in the drift, these buoys;

(Testimony of M. Lugnet.)

were they in the path where the gill netters habitually drifted?

A. There were lots of gill netters drifting close to the shore when there was a strong tide especially.

Q. Do you know anything about set nets?

A. No, sir. Well, I know something but not on the Columbia River; I was fishing for Mr. McGowan on the North River in '87, set netting.

Q. Well, that would qualify you here as an expert. How long did you fish set nets on the North River?

A. About four weeks.

Q. Now, are you acquainted with the current in front of Sand Island where these buoys were located?

A. Well, I ought to know; I have been there often; it don't run always alike, hardly two days or two tides alike.

Q. Now, supposing that a set net were attached to those buoys that were there, one end on the inside buoy and one on the outside buoy, what effect would the current have on that set net?

A. If it was setting across the river, it would be across the current, and if tied they might stay there and they might not.

Q. What effect would the current have on the net?

A. If they were hung on the buoys and tied up from 10 feet, and used heavy rocks on the bottom, they would be up and down for awhile, but if there is an anchor on the bottom, they will get [362] under further in a strong current. If they are hung up on cork line, it might take the lead line up off the bottom.

(Testimony of M. Lugnet.)

Q. If the lead line was weighed down with rock and those buoys you saw on top, would those buoys go under water?

A. Yes, the buoys were on top of the water.

Q. And would the current take the buoys and cork line underneath the water?

A. If they were tied on one end, it would take them down.

Q. What effect would that have upon fish that happened to be gilled there?

A. I hardly ever got any fish when I snagged my net. When they got hung up, it would generally take the fish out.

Q. Do the fish run along the shore there at low slack?

A. You fish almost all the time; you have a chance except in a very strong tide.

Q. But will salmon run in that close to the shore at low slack?

A. We generally fish in a deeper water in a slack tide.

Q. What is the reason for that?

A. We can make our nets stand better.

Q. Can you catch fish close to the shore?

A. Sometimes, it is pretty hard to tell. When there is fish, you can catch them most anyway, and when there is no fish, you cannot catch them anyway.

Cross-examination.

(By Mr. DORR.)

My idea is that when there is no fish, you cannot catch them, of course. I was on North River in

(Testimony of M. Lugnet.)

1887. I was then working for Charles McGowan and the old man. I was drift netting first and then set netting. They have a pretty good current over there, but I set my net pretty close to the shore, on the low side. I drove piling there ten or twelve feet apart, and hung the line on, and then hung the net on that, and put heavy rocks on the lead line.

Q. What is the strength of that current in the North River as compared with the current off Sand Island where these buoys [363] were?

A. I could not judge of that.

Q. It is a good deal stronger in the North River?

A. I believe on the ebb tide it is stronger on the Columbia River than on the North River.

Q. How about the flood?

A. Well, on the flood too, except on a slack tide.

Q. Are you speaking of the main river or inshore along Sand Island?

A. The way the current is there on the first tide from the time it runs very close to the shore, and then after a little it keeps working out and is stronger outside and not quite as strong along the shore.

Q. Are you acquainted with the other localities over at Willapa where they use set nets?

A. I have never been set netting there. I fished there but not set net there since 1887.

Q. Have you seen set nets there?

A. I have seen them but have not been right where they were.

Q. How many set nets did you have?

A. I had two little pieces in the North River.

(Testimony of M. Lugnet.)

cause there was always some other nets out there. It was no use to try to lay on top of another.

Q. Do those gill nets frequently get tangled?

A. Yes, sometimes they get all mixed together and go to the bottom and you cannot see any of them.

Q. They have troubles of their own as well as with buoys?

A. Yes, they have enough trouble all right; I had it any way.

Q. How did you catch fish on the river; were you high man or low man?

A. Well, I was pretty good in my young days, but now I guess I am getting too old.

Q. How many tons did you average per season?

A. When I first was fishing I did not weigh the fish; we counted them.

Q. Did you ever fish by weight?

A. Yes, the last four years.

Q. What is your average?

A. About 5 or 6 tons or 7, or sometimes a little over.

Q. Are you fishing still in the season?

A. I have my gear but I was not fishing this last summer. [366]

Q. Did you fish the year before? A. Yes.

Q. Who did you fish for?

A. For the combine—the Columbia River Packers' Association.

Redirect Examination.

(Interrogated by Mr. FULTON.)

The kind of fish I caught on North River was sil-

(Testimony of M. Lugnet.)

ver salmon and dog salmon. We caught no Chinook salmon, not in a set net. These dog salmon run up the river in great quantities, sometimes even on the high ground. They are entirely different from the Chinook salmon.

Q. You could not catch salmon in a set net on the Columbia River?

A. I don't think so; I have not seen it. They might, but I never saw it.

Q. And these dog salmon and salmon fish you got up there are not worth anything compared with the Chinook?

A. They paid pretty good for the silversides, but the dog salmon we had to throw overboard; they are not worth anything at those times.

Q. Speaking of these buoys, state whether or not in your judgment any fish could have been caught in a set net in front of Sand Island where these buoys were.

A. That is more than I could tell; I could not make any judgment at all, whether they would work or not.

Q. Do you think that is worth anything for a set net location?

A. It would not be worth anything to me; I know that.

Q. Why wouldn't it? A. I would not have it.

Q. Why?

A. Because I could not make anything on it, and I would not try it.

(Witness excused.) [367]

[Testimony of Ole J. Settem, for Plaintiff (in Rebuttal).]

OLE J. SETTEM, a witness called on behalf of the plaintiff, after being first duly sworn, in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. FULTON.)

I reside at Astoria; I have lived there since 1884. I have followed fishing in the summer-time and working in the sawmills in the winter-time. My principal occupation was fishing, and I continued that until 1905, when I went to work for the Department of Fisheries for the State of Oregon, as water bailiff. That is the name the legislature gave it, what it means I don't know. My business was to enforce the law of fishing on the Columbia River and other places, and to look after the fishermen to see that they had their licenses and so forth. I was an officer of the State of Oregon, appointed to see that the fishing laws were enforced, and it was my duty to inspect all fishing gear and appliances and see that they were as required by law, and that parties had licenses—about the same as the Fish Commissioner himself. My territory was on the Columbia River up so far as Celilo Falls. I held that office up to the fall of 1908, and in performing my duty I had occasion to and did observe the manner in which fish were caught in the river outside of my own general knowledge, and I had occasion to, and did, examine into the manner in which set nets were operated. I have examined a great number of set nets on the lower Colum-

(Testimony of Ole J. Settem.)

bia River. Set nets are operated all along the Oregon side from Youngs River beach, near Astoria, to the eddies near the mouth of the Cascade Locks. There were some nets operated in the Columbia River below Astoria. One was hung on the piling on the Union Fishermen's cannery, and one on the old traps standing below the cannery, which is pulled out now. They were not there in [368] the summer season, because the fish don't go in there in the summer. It is in the winter from the first of January to the first of March when the season is closed. When the season opens in the spring they don't use set nets because the fish don't go in. These set nets might get a salmon, but if they get a fish, it is generally a steelhead, because the steelhead will get the web twisted around his teeth; otherwise, he would be pulled out by the tide. The tide is pretty strong down by the traps, but not by the cannery. I have had experience in operating set nets, and from my experience it does not pay for anyone to operate a set net except you have an eddy to put it in and the net fixed just to fit the eddy. I have had two years' experience operating set nets for six or seven weeks, and some years ago, I was operating set nets in the winter-time. I understand how they are operated, and I have also examined all the location between Astoria and the Cascade Locks, and I informed myself as to which set nets caught fish and which did not. These set nets on the Columbia River are always placed in eddies. I have not found set nets in the river excepting in the eddies. There are a number of them be-

(Testimony of Ole J. Settem.)

tween Stella and Hog's Island. There is a straight beach there and they have a pile-driver and drove piles out from the shore and used brush and rocks at the bottom and filled it up to the low-water mark, and then planked it up to the high-water mark, and thus they made an eddy to catch the fish; otherwise they could not catch fish. They made these eddies themselves, and it is only in eddies that set nets are operated. That is for two reasons: the current comes down fast and the nets will stand up and down. If the net is not set out from the shore, *it if* is tied to the piling and made fast to the beach so that the cork line cannot go down, then they will take the lead line up from the bottom, if there is no piling there but only buoys and anchored solid, it will take the cork line down, and if there [369] is only one end fast, then the meshes will stand that way in the current, lengthwise, and no fish can be caught. In order to gill, the mesh must be square, and it will not do that, except in an eddy.

I have gill netted a good many years, mostly in the lower river from Scarboro down along Sand Island and right out to the bar.

I am familiar with Sand Island and have been for many years. I saw these buoys that were placed in front of the Columbia River Packers' Association's fishing grounds, which it leased from the Government on Sand Island. I don't know the lines exactly, but I know it was in front of that place. I examined them and I found the license numbers O. K. When I was there there were two men laying in a skiff;

(Testimony of Ole J. Settem.)

one man sitting in the bow and one in the stern. They had five or six fathoms of net, and two guns in the boat, and one big revolver on each side, and a belt around their body chuck full of cartridges, and the gun getting ready to shoot; what they intended to do I don't know. They asked me what I wanted and I told them I was going to see if they had licenses as required by law, and when I saw that I said that is all. One of the nets was close, and I saw the character of web it contained. It was a cotton seining web, with heavy lead and cork lines, seine cork and some big gill net corks.

Q. Was it possible to catch fish with that?

A. You could not catch fish with a gear like that, by set net. It might have been used for seining but not in that position. No fish could be gilled with that net.

(Witness continuing:)

These buoys were right in the drift of the gill netters on the running tide, on slack tide, the gill netters don't go in there because there is no fish to be had. The reason of that is, [370] some say that the fish go right out in the deep water to catch the current; others think the fish are there, but stay right down on the bottom and do not move; and I know men who have tied long line, fast up on the beach and with 20 or 30 fathoms of net, and then drifted at anchor with the boat and held the net until the tide starts, but I have never heard of men getting fish that way. My experience and that of others with whom I have

(Testimony of Ole J. Settem.)

talked, is that at slack water fish do not run near the shore.

Q. What in your judgment would be the rental value, or otherwise, of this ground you speak of where these buoys were located for set net purposes?

Mr. DORR.—That is objected to as incompetent and no sufficient foundation laid, and immaterial.

A. My opinion is that a thing you cannot be benefited with is worth nothing.

Q. What would be the fair rental value of that ground for set net purposes?

A. No value at all; nothing at all.

Q. Why?

A. Because it would not pay anyone to operate the set net.

Q. Is there any way one could operate set nets there successfully?

A. My judgment is that there is not.

Q. Explain your reasons why.

A. Because you cannot keep a set net there in the running tide; the gill nets drifting down on the strong current and back on the flood, they will hook that and drag them away, and if they are anchored too solid to drag them, they will cut them away; they will not stand for them down there.

Q. Any other reason?

A. The experience is that there is no fish to be caught near the beach on a slack tide.

Q. Your judgment is that no matter how skillfully a set net would [371] be placed or operated, it would catch no fish?

(Testimony of Ole J. Settem.)

A. It would not catch fish that would pay anything to operate.

Q. Something has been said about fish gilling in clear water; I wish you would explain that a little more fully.

A. The experience of all those who have operated gill nets is that when there is clear water and fish come up to the net, they see the net and stop and they run along the net. I have seen that myself time and time again, and have heard others say the same.

Q. When the water is clear, when do gill netters gill fish in their nets? A. At night.

Q. What proportion of the time is the water clear ordinarily around Sand Island?

A. It is most always clear on the flood, the whole season through. Of course, as soon as the flood stops, the muddy water comes down, but it settles.

Q. What proportion of the season is the water of the Columbia River muddy?

A. In June is generally the freshet time, and then it is muddy, until it is clear.

Q. The Columbia River is ordinarily a clear stream? A. Yes, sir, it is.

Q. How does the tide come down there in the vicinity of Sand Island; how long a space is there between the turn of the tide at high water?

A. It is a very short time that there is slack water.

Q. Explain the action of the tide in that respect.

A. If you are close to shore it will stay on longer, but if you are thirty or forty fathoms out it will stay very little. It depends on the weather; if it is spring

(Testimony of Ole J. Settem.)

tide there is no appreciable slack.

Q. And in the small tides, how long is the space between the [372] current?

A. That depends on the weather.

Q. Well ordinarily?

A. On the small tide there is hardly slack water at all. It begins coming ebb up along the shore again. In real fine weather, no wind, there might be slack along the beach for half an hour or an hour and a half. There is hardly two days that is the same; you cannot say exactly.

Q. Now, what has been your experience with fish that have been gilled, where your net has been caught in anything so that the current runs through your net?

A. The fish is torn out; sometimes I have been snagged. You can get fish by the head in the net and the fish is gone if there is running tide.

Q. So that if you are able to lay a set net in front of Sand Island at the point where these buoys were and should be fortunate to catch salmon at slack tide, what would become of it if you did not take it right out? A. It would be thrown away.

Q. And you think it could only be fished at all not to exceed an hour or an hour and a half on high tide?

A. Not so long as that on high tide; on low tide it might.

Q. A man would have to be awfully busy to take a salmon?

A. Yes, if there was any in. If it is a set net, you

(Testimony of Ole J. Settem.)

have to be there to go over it or you cannot raise it.

Q. Why?

A. Because the current is so strong it will hold it down.

Q. It would hold the buoys right under water?

A. Yes, sir.

Q. And then if there were fish in it at low slack they would get away?

A. Yes, at low slack. [373]

Q. One or two witnesses have testified that in their judgment if we had allowed eight set nets to have been fished there, they would have caught in the neighborhood of 100 or 150 tons of fish; what is your judgment about that?

A. That is the same as when the grandmother tells the children some stories, they may believe it, but people of common sense would never believe it.

Q. It is a fairy tale? A. Yes, that is all.

Cross-examination.

(Interrogated by Mr. DORR.)

Q. You were water bailiff for four years?

A. Yes, from the spring of 1905 and resigned in the fall of 1908.

Q. What have you been doing since that?

A. I have been fishing.

Q. Gill netting?

A. Set netting and gill netting.

Q. Where?

A. I have been operating set nets these two years in Young's River on the south side of Astoria—the southwest.

(Testimony of Ole J. Settem.)

Q. Below Astoria?

A. Yes, sir, you have to go below Astoria to go there.

Q. Did you catch fish there? A. Yes.

Q. What kind? A. Shad.

Q. Then there are shad in the river also?

A. Yes.

Q. Are there many of them?

A. Well I catch enough to make wages.

Q. How is your set net constructed over there?

A. It is a special gear for shad. [374]

Q. It is the same general construction?

A. Yes.

Q. How is it built?

A. I tie them fast in shore and anchor buoy in the stream.

Q. How long is the net?

A. It depends on the size of the river. The longest net is 45 fathoms, down to 14 fathoms.

Q. That is, depending on the width of the river?

A. Yes.

Q. You are not allowed to stretch the net across the whole river?

A. There is no limit in District Number One, but in the Coast streams it cannot be done.

Q. State what the limit is there.

A. One-third of the stream.

Q. How many set nets are there ordinarily each season on the Columbia River that have been under your jurisdiction as an officer?

A. The highest number I had, if I remember right,

(Testimony of Ole J. Settem.)

was 194; that included right up to The Dalles.

Q. That is on the Oregon side?

A. The Oregon side; that included the Willamette River, Young's River, and all the tributaries.

Q. One hundred ninety-four?

A. I think that was it.

Q. Where is Stella?

A. Stella is in Washington opposite Mayger and half way between Portland and Astoria.

Q. Where was this long beach?

A. That was on the Washington side.

Q. Between Hog Island and Stella?

A. Yes, sir.

Q. What were you doing over there? [375]

A. I am all over; I took in both sides.

Q. Were you under the jurisdiction of Washington too?

A. No, I was to report to Burton if there was any violation there, and he would report to me if there was any violation on the Oregon side. He was the deputy fish commissioner of Washington.

Q. You just had an understanding you would look out for each other?

A. Yes, sir; we worked together in that way.

Q. How long is this beach, between Stella and Hog Island? A. I think about three miles.

Q. A straight beach? A. Yes, no points.

Q. And no eddy?

A. No, except what they made.

Q. They made an artificial eddy by putting in rock and brush? A. Yes, sir.

(Testimony of Ole J. Settem.)

Q. As you explained? A. Yes, sir.

Q. How many set nets in that section?

A. One set net in each of those eddies.

Q. Between Stella and Hog Island?

A. Three; one to each eddy.

Q. That is these artificial eddies? A. Yes.

Q. What kind of a current do they have over there commonly?

A. The current comes straight down along the beach; a swift current, except in the summer when the river is low, but they could not put in set nets just for the slack water.

Q. Does the tide flood up that far?

A. In the summer-time it comes up as far as Wilamette River.

Q. What is the ordinary rise and fall of tide at Sand Island? [376]

A. From five feet six inches up to pretty near ten feet.

Q. What is the average?

A. About seven and one-half or eight feet.

Q. For the same reason you were looking after the interests of the Washington Commissioner, you examined these buoys in front of Sand Island?

A. Yes, sir.

Q. Did you find them properly licensed?

A. Yes, they were O. K.

Q. And you told the men they were all right?

A. I told the men I had nothing to do with them.

Q. And you did not attempt to bother?

(Testimony of Ole J. Settem.)

A. I had no right to bother them.

Q. They were legally there as you understood?

A. According to the law, yes.

Q. You made no report of it to the Commissioner?

A. No, I had nothing to report; nothing wrong.

Q. You did not make reports unless you found something wrong? A. No.

Q. The gill netters you say fished in the night?

A. Yes, and in the daytime too, in the spring-time.

Q. Generally in the night after July 1st?

A. At all seasons at night.

Q. But not in the daytime?

A. On the flood; if there is a wind that stirs up the sand and a strong current takes the sand along and makes the water muddy.

Q. Now, isn't that the case most of the time?

A. No.

Q. On the flood tide the sand is stirred up and the water is discolored with the silt and sand in suspension in the water? A. Yes. [377]

Q. That is the universal condition down there in the flood tide?

A. No; there may be two or three days of that.

Q. I understood there was a law passed in Oregon in 1908 prohibiting fishing down there in the night?

A. No, sir; no such law been passed.

Q. I am mistaken about that?

A. You can fish at night during any time you can fish in the day.

Q. Maybe I am mistaken in assuming there was a referendum act passed.

(Testimony of Ole J. Settem.)

A. There was an act but not prohibiting night fishing. There was a prohibition against fishing below a point between Smith Island and Pentalus. It did not take effect until the fall of 1908, the 10th of September.

Q. Are you in any way connected with the Columbia River Packers' Association? A. Not at all.

Q. Entirely independent?

A. Independent; I don't owe them a cent and they don't owe me.

Q. You are not working for them?

A. No, sir.

(Witness continuing:)

(Interrogated by Mr. FULTON.)

Q. You have no interest in the corporation one way or the other?

A. Not so far as I know, unless they would give me a few hundred shares of stock.

Q. But they have not? A. No.

(Witness excused.)

Plaintiff rested. [378]

Sur-rebuttal.

November 11, 1910.

[Testimony of Jens Nielson, for Defendants (Recalled in Sur-rebuttal).]

JENS NIELSON, a witness heretofore called and sworn on behalf of plaintiff, was recalled by the defendants as a witness on their behalf, and in response to interrogatories propounded to him testified as follows:

(Testimony of Jens Nielson.)

(Interrogated by Mr. DORR.)

Q. I want to ask you Mr. Nielson whether there is not a great deal of jealousy down on the river amongst the gill net men against the other kinds of gear that are used there for fishing.

A. Not if they don't come out in our route where we are drifting. The seines, of course they don't bother us. If they lay out ahead of us, they generally wait until we are past, because we drift them. There is only one kind of seine bothers us.

Q. And there has been a great deal of opposition to fish traps and other kinds of gear by the gill net men?

A. That is not for the fishing, but that is because we claim they kill off the young salmon for the hatcheries. The traps are in Bakers Bay and not out where we are drifting; that has been closed a long time. We had no objection at the time they started in with traps.

Q. You claim that set nets will kill off young fish?

A. Oh, no; I don't say that.

Cross-examination.

(Interrogated by Mr. FULTON.)

The only objection that the gill netters have to traps applies only to such traps as are in the navigable portion of the river and obstruct the floating of the gill nets. There is no fight against traps because they are traps, but when they obstruct [379] navigation, then there is an objection, but if they are not, we do not object, if they don't get in our way. Our way is in the navigable stream, and the

(Testimony of Jens Nielson.)

objection to fish wheels is that they indiscriminately catch everything that comes in their way and destroy the young salmon, and does not permit the salmon to reach the spawning grounds, and that would ultimately destroy the salmon that is in the Columbia River.

The class of people comprising gill netters are all kinds; in the summer they fish—men of all trades, and a great many well-to-do people right in town go out fishing. A majority of them have families of their own and live in Astoria, and men who stand high in the community, both church people and educated people; all kinds of trades people, carpenters, blacksmiths and so forth—about every trade is represented on the Columbia River. At the time of spring fishing, *there* are not a band of outlaws by any means; if *there* are, I must be one.

Redirect Examination.

(Interrogated by Mr. DORR.)

Fishing season begins the first of May and lasts until the 25th of August. That is what we call the spring fishing season. Of course, a good many don't start until in July.

I have seen young salmon at the hatcheries, but I have never seen any going up the Cascades. I have never heard of young salmon going up the river to spawn; they generally go down. Of course, small salmon about two pounds or two and one-half pounds go up. I cannot say whether they would be simply small but not young. There are lots of young salmon that go up the river, two or three pounds.

(Testimony of Jens Nielson.)

Q. What I want to know especially is when you allude to catching twelve tons of salmon, in your testimony yesterday, during the season, what season did that mean?

A. We count from the spring opening to the spring closing. [380]

Q. And where you said the average was three or four tons you meant the same season?

A. Yes, sir.

Q. You did not refer to the fall or winter fishing?

A. No, sir.

Q. Just what you call the spring season?

A. Yes, sir.

Q. And that is what is commonly meant by the fishing season?

A. Yes, sir, on the Columbia River; that is the spring season. Of course in the fall only a few men go out. The majority do something else.

(Witness excused.)

[Testimony of J. F. Ford, for Defendants (Recalled in Sur-rebuttal).]

J. F. FORD, a witness on behalf of the defendants, was recalled, and in response to interrogatories propounded to him testified as follows:

(Interrogated by Mr. DORR.)

I have already testified in this case at the former session, and at that time, I produced some photographs. I am personally acquainted with the waters and the contour of the shore on the south side of Sand Island. I have some photographs of the locality showing the general course of the shore at these fish-

(Testimony of J. F. Ford.)

ing grounds in controversy in this suit, other than those I have heretofore produced.

I am acquainted with the shore along that part of Sand Island, and there are three circles on the south shore of the island, making two small bays and one large one, and there are eddies in each of the small bays. The first little bay is at the east end of the island; one is near the center, and the other is a little west of the center of the island. I have a photograph covering particularly that part of the shore. (Here witness produced a photograph.) This is a photograph taken by [381] myself. It was taken in the year 1907, in the month of August. It was taken from the center of the island, looking west or southwest, on the beach, on the sand on the south shore of the island.

Whereupon, said photograph was marked Defendants' Identification Number 21.

This is a true picture. The ground shown in this photograph that the seine is being drawn on, to the best of my knowledge, is the middle ground shown at a low tide.

Q. At what stage of the water, if you know, have you seen the principal seining there?

Mr. FULTON.—That is objected to as incompetent, irrelevant and immaterial and not rebuttal testimony, but a part of the defendants' main case.

A. The best catches I have seen are at low tide. I have seen them fish at all stages on the different grounds but not on this lower ground, but the chief fishing is at low tide. The bend in the shore is the

(Testimony of J. F. Ford.)

lower bay. I do not know who these people are in the photograph; they are fishermen; I don't know any of them by name. My object in taking this picture was for the commercial value to me as a photograph; it had nothing to do with this case.

Thereupon, counsel for defendants offered said photograph in evidence.

Mr. FULTON.—Q. I would like to ask, do you know where the Columbia River Packers' Association were fishing on sites two and three during the years 1908, 1909 and 1910? A. Yes, sir.

Q. This (referring to the photograph) is in front of their premises?

A. If I am right, it is the middle ground called number two.

Q. In front of Site Number Two where the Columbia River Packers' Association were fishing?

A. Well, I would not know as to the exact survey. [382] It is the shore of the land where the Columbia River Packers' Association were fishing in 1908, 1909 and 1910, but I don't know who was operating the seine there, unless it would be Jack Service. I think that is him (witness referring to one of the men in the picture), but I could not say for sure. I think that this picture was taken on the ground that Jack Service was seining during the year 1907. The distance from the man shown in this photograph to the point down at the further left side of the picture, I should judge it to be a mile.

Thereupon, counsel for plaintiff objected to the introduction of said photograph for the reason that

(Testimony of J. F. Ford.)

it is incompetent, irrelevant and immaterial, and being part of the defendants' main case.

Mr. DORR.—Q. Does the picture show the extreme southern part of that island?

A. Yes, sir.

Q. Whereabouts in the picture is that shown?

A. It is at the west extremity of the south shore and fishing ground.

It shows at the old steamer "Republic." That would be just off the picture, at the point of those seines on the left side. The bow of the boat you see there is a sailing skiff. That boat belongs to the crew. The point of land just over the boat is the outer point of the lower sands. The boat is, of course, much nearer, but you can see the land in the perspective.

Whereupon, counsel for defendants offered said photograph in evidence, and the same was received in evidence, marked "Defendants' Exhibit No. 21," and is hereunto attached so marked.

Thereupon, counsel for defendants handed witness another photograph and asked the witness if he could identify the same.

A. That is a photograph of the middle grounds on Sand Island. I [383] made this picture in the year 1905 for commercial purposes. The grounds included in this photograph are a little east of the other picture (Exhibit No. 21), looking down across the same shore and beach, and it shows the shore line and the point of sands where they are seining below. When I took this photograph, I was standing near

(Testimony of J. F. Ford.)

the middle of the island, on the south shore, looking west, and this picture shows the outline of the south shore of Sand Island correctly at that locality. I should say that the indentation of the bay into the land, in the arc of the circle that it makes, is 500 feet. I do not know the people shown in the picture. They were just hired fishermen. The picture was taken in the month of August at low tide.

Whereupon, said photograph was offered in evidence by counsel for defendants, and the same was received in evidence, marked "Defendants' Exhibit No. 22," and is hereunto attached so marked.

(Witness continuing:)

I have another photograph here taken by me in August, 1907, at the same time I took Exhibit No. 21, or within a few days of that time. It was taken for the same purpose. The territory covered by this photograph is simply on the lower point, outer point of the sands on the southwest point of Sand Island. It is the main point that is shown in Exhibit 21, at the left margin of that picture. I was standing at the waters' edge of the sands, on the shore to the eastward of that point, and looking westward. The picture was taken at low tide. I know part of the people that are in this photograph. Willie Brumbach is standing in the boat, with some visitors. I can't name the crew, but it was Steve Butt's crew. I know this ground as the lower fishing ground—I think it is what is known as the Brumbach ground. I understood that McGowan and Company were operating the ground that year. The only object I had in mak-

(Testimony of J. F. Ford.)

ing this picture was its [384] commercial value and its beauty. The fish shown in the net in this picture are principally salmon, steelhead and salmon and blueback—Chinook salmon.

Whereupon, said photograph was offered in evidence by counsel for defendants, and the same was received in evidence, marked "Defendants' Exhibit 23," and is hereunto attached so marked.

(Witness continuing:)

I have another picture, marked "Copyright 1905 by J. F. Ford." I made this picture in August, 1905. It covers what is known as the Brumbach ground, that is, the lower end. I made this picture for commercial purposes the same as the others. When I took this picture I was standing on the beach just above the fish, looking to the southwest. This Brumbach ground partly lays in the bay I speak of and covers this point. I know many of the people included in this photograph—James McGowan, Rube Rodgers, and William Vaughn. They were working for McGowan, catching Chinook salmon, mixed with steelhead and blueback. This picture was taken at low tide.

Whereupon, counsel for defendants offered said photograph in evidence, and the same was received in evidence, marked "Defendants' Exhibit No. 24," and is hereunto attached so marked.

Q. Can you show the Court these bays which you have now specifically testified to as existing on the south side of Sand Island in any other photograph that you have heretofore produced?

(Testimony of J. F. Ford.)

A. Yes, sir. In this photograph of Sand Island marked Defendants' Exhibit Number 2, showing the three little bays, one at the east end, the middle and the west of the center of the island, showing the eastern point of the island, the two middle points and the spit Republic. The red cross in this picture seems to be at the east end of the island opposite the first little bay; then we have the little bay in the center of the [385] island, and the bay in the west end, which is immediately to the left on the picture with the red cross, and the dots out in the water are gill net sail-boats, and the rows of piling shown on this picture are fish traps.

Cross-examination.

(Interrogated by Mr. FULTON.)

We usually call the little circles that are partially protected from three sides bays; the water in the middle circle we call a bay. I do not know where I got that definition. I do not recall the definition that the geographies gave of a bay. I know that all shores and streams have slight indentures, more or less. This indenture is in the same shape as Baker's Bay, only on a miniature scale. The shore is about a mile long and indented 500 feet.

Q. And as a matter of fact this is a long shore and it just indents in very slightly and the current runs right along just the same?

A. No, the current slacks there.

Q. How do you know?

A. I have been there in a boat many times.

(Testimony of J. F. Ford.)

Q. The current slacks anywhere at certain stages of the tide?

A. No, sir; not out 500 feet; it is a fierce running tide.

Q. Then 400 feet out; how deep is the water?

A. I don't know.

Q. You mean 500 feet out at low tide or high tide?

A. There would be possibly 100 feet difference between the tides.

Q. Then which do you refer to? A. Low tide.

Q. Then that would be about 600 feet out at high tide? A. Yes, sir.

Q. And the current is running fiercely?

A. Yes, sir. [386]

Q. Let us understand that; the current is running fiercely? A. Yes, sir.

Q. As fast as it does anywhere? A. Yes, sir.

Q. Now, just how close to the shore does this fierce current stop; there must be some space between the 500 feet and the shore where it slacks?

A. Yes, sir; 100 or more feet where it gradually slacks.

Q. About 100 feet from the shore?

A. No, from the swift water.

Q. That would reduce it to 400 feet from the shore?

A. Yes, possibly; but let me say that at different stages of the tide it is different.

Q. Now, you stated that 500 feet from the shore the current runs swift, fiercely?

A. Yes, sir, it does.

Q. And 100 feet back from the 500 feet you would

(Testimony of J. F. Ford.)

begin to get slack? A. Yes, sir.

Q. And where is it slack; how close to the shore does it slack? A. Well, I couldn't tell.

Q. You know well that with the large body that is there, with a fierce current 500 feet from the shore, you have a current almost right up against the shore?

A. No, sir. I know that while one boat will be going swiftly downstream, 300 feet from that a boat would go the other way.

Q. Three hundred feet below or above?

A. North of it, in shore.

Q. That is what you call the eddy? A. Yes, sir.

Q. Where one current is going upstream and the other is coming down? [387] A. Yes, sir.

Q. That is the whole length of this indenture?

A. Yes, sir.

Q. And out 500 feet from the shore you have a fierce current going one way and another current going the other?

A. Yes, sir, a mild current going the other way.

Q. What do you mean by the eddies?

A. Those little bays.

Q. Where the water swirls around at times?

A. Yes.

Q. Those swirls do not stay in any particular place, do they? A. No, sir.

Q. They run up and down and around like a maelstrom?

A. Those little slacks run easily; they can handle a seine in them.

Q. But there is no permanent place for the eddy;

(Testimony of J. F. Ford.)

they run up and down wherever there are currents meeting at any particular time; and that forms sort of a swirl? A. Yes, sir.

Q. That is what you call an eddy?

A. That is one. This eddy is made by the current striking the lower part of the sands and letting the water be slack between that and the swift current.

**[Testimony of Nels Sankala, for Defendants
(Recalled in Sur-rebuttal).]**

NELS SANKALA, a witness called on behalf of the defendants, after being first duly sworn, in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. DORR.)

I live at Ilwaco; I have lived there since 1884, and I am by occupation a fisherman. I fished with gill nets in 1883, and then worked in the cannery for the Aberdeen Packing Company; [388] after 1899, I worked in the seine; for the last three years I have not worked. I worked with seines in 1899, on Sand Island.

Q. Who did you acquire the right from at that place in 1899?

To this question counsel for plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial.

A. The Aberdeen Packing Company owned that and turned it over to the Columbia River Packers' Association, and I got it from them.

I bought it from the Columbia River Packers' Association in 1899.

(Testimony of Nels Sankala.)

Mr. FULTON.—I further object on the ground that a transfer of real estate cannot be established by parol testimony, nor can a transfer of an hereditament nor an appurtenance be proven by parol, and plaintiff moves to strike the testimony of this witness as to the purchase from the Aberdeen Packing Company and from the Columbia River Packers' Association.

Mr. DORR.—We do not claim he purchased any real estate or hereditament, but that he purchased a fishery right.

Mr. FULTON.—We insist on the motion, and on the further reason that the fishery right is an appurtenance if it exists at all, and consequently can only be proven by a writing.

Mr. DORR.—Our contention is that the witness purchased a possessory right of fishery.

Mr. FULTON.—I further object that no fishery right can be acquired in the State of Washington or in the State of Oregon by possession.

After I purchased this property, I started fishing there, and I fished there for about eight years altogether, beginning I think with the year 1899. The last year I fished there was 1907. During the last three years I had a partner fishing there with me. I know the defendant, Henry S. McGowan; I have known him for about twenty-five years. I know the set net [389] locations placed by him on my fishery in 1908, in the month of June. I was working there on a set net for McGowan.

Q. State whether McGowan or anyone else asked

(Testimony of Nels Sankala.)

you for permission to locate the set nets on that ground in 1908.

To this question counsel for plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial.

A. Yes, sir, he put out the buoys and I put in the net.

I know where Sites 2 and 3 are on Sand Island. I was at No. 3; McGowan was next to me. I was in front of No. 3 and McGowan in front of No. 2. There were four set nets there in front of No. 3. Those were put there with my permission.

Q. I want to ask you whether there is any eddy along there in that water?

A. That is pretty hard to tell. Sometimes hardly any at all; sometimes about 150 fathoms, there is an eddy.

Q. How far does the eddy go out if there is one?

A. Sometimes pretty far out and sometimes not much at all; sometimes at half tide it is pretty far out, and sometimes not far out.

Sometimes the water runs so that they put the seine in the shape of a jack-knife, half closed, and then run it back and forth. When I was fishing on my own account, I operated three seines; I used two all the time.

Q. How much money did you make a year during the fishing season?

To this question, counsel for plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial.

(Testimony of Nels Sankala.)

A. Some years more and some less; about five, six to eight thousand dollars, I think is the highest.

In seining there I found that you did not get any salmon until the seine comes up to the shore. The seine that I used was about 250 fathoms in length. At low tide all of the fish [390] are close to the shore. I caught most of my fish at low-water slack, or the first of the flood.

Cross-examination.

(Interrogated by Mr. FULTON.)

My seine was 200 fathoms in length. I put it out full length from the shore. It went out into the channel about 200 fathoms. I put it out there to fish.

Q. Couldn't you fish just as well close inshore?

A. Yes, what I could put my seine.

Q. Couldn't you catch just as much fish close inshore in the place where the water is all slack as you can way out in the channel?

A. Sometimes lots of fish close to the beach, and lots outside; I don't go very far out.

Q. What do you call close; how many fathoms?

A. With the seine.

Q. You say sometimes you catch them close; how many fathoms do you call close?

A. About 100 fathoms or something like that.

Q. Don't you know that salmon don't run close to the shore at low slack water?

A. I have seen them swimming close to the shore.

Q. That is in your seine; but when they are not driven in by the seine, at low slack water?

A. Pretty close.

(Testimony of Nels Sankala.)

Q. How close at low slack water?

A. They come close in July or August.

Q. I am talking about low slack water. A. Yes.

Q. Do salmon come close in shore—not steelheads?

A. Yes, sir.

Q. How close? [391] A. That is hard to tell.

Q. One hundred fathoms?

A. One hundred, or seventy-five, or even fifty.

Q. At low slack water?

A. Yes, sir; yes, I catch fish all right there.

Q. You put your seine out in low slack water when there is no current? A. Oh, yes.

Q. About 100 fathoms? A. Yes.

Q. Seventy-five or a hundred?

A. I put it all the way.

Q. You only put it out about 75 fathoms?

A. I haul it out and bring it around.

Q. How far out did it go from the shore?

A. I got the tail line clear out.

Q. That would be 200 fathoms?

A. Yes—150 or 175.

Q. You say that you bought this fishing right from the Columbia River Packers' Association?

A. Yes, sir.

Q. Who did you make the deal with?

A. Mr. R. A. Hawkins. I asked him if the Aberdeen Packing Company had turned that over to the combine, and he said yes, that he put it in at three hundred dollars. I said that I would see the Aberdeen Packing Company's books and find out how much fish they caught before.

(Testimony of Nels Sankala.)

Q. Then what did you do?

A. Mr. Hawkins said he would give me the first chance to buy the business.

Q. And he wanted how much for it?

A. Three hundred dollars, and I gave him a mortgage and paid him [392] the same year.

Q. Did you get a writing showing what you bought?

A. No. I do not know that he gave me any writing; I don't know.

Q. In whose name was the license issued for fishing the ground?

A. He did not give me the license.

Q. Whose name was the license in?

A. I don't know.

Q. You swear you don't know in whose name the license for those seines fishing that ground was in during the time you fished after you claim you bought out from the Columbia River Packers' Association?

A. Yes, I said I want a license, and he said he would keep the license, and got it so that nobody else would come over there, but that it was my place he said; he said he would hold the license.

Q. In his name? A. I don't know what name.

Q. You never paid for the license?

A. Yes, I paid it every year.

Q. Then the license was always in your name?

A. No.

Q. In whose name?

A. I don't know what name; he put in the license. I gave him the money and he gave me the number.

(Testimony of Nels Sankala.)

Q. Don't you know that the Columbia River Packers' Association always held the license?

A. I don't know; I had the number. He gave me the number. I paid him the license.

Q. And don't you know that you bought for this three hundred dollars some seines and other property from the Columbia River Packers' Association and did not buy fishing sites?

A. I bought the whole outfit to fish. [393]

Q. Now what made you give it up, why did you quit?

A. He put it in at too high a price and I had no money to raise that price.

Q. The fishing right did not belong to you then?

A. No, the Government owned the land.

Q. Then you never owned it at all?

A. I did not own the land.

Q. I thought you said you did?

A. I paid the license.

Q. You say that the Government owned the land?

A. The Government rented it out.

Q. Who owned it in the first place?

A. The States, I think.

Q. You thought the States owned it?

A. I paid the license in the States.

Q. You know how to get a license for seining?

A. Yes; I saw a license application in the window and I told Mr. Hawkins to get the license.

Q. Did you sign your name to any license, to any paper? A. No, sir.

Q. Don't you know you cannot get a license unless

(Testimony of Nels Sankala.)

you sign the application?

A. I don't remember that; I got some license all right anyhow.

Q. Where is it? A. I haven't any now.

Q. Did you ever have one?

A. I don't get nothing but the number.

Q. You never had the license?

A. No; I got none of the licenses at all, but I paid it.

Q. So when the Government concluded to survey this Sand Island off into sites, they put it up for bid?

A. Yes. [394]

Q. Did you bid on it?

A. Yes, I got it the first time.

Q. What did you bid on it for?

A. I wanted to fish it.

Q. But it already belonged to you I thought.

A. But the Government took it after that.

Q. I thought you owned it.

A. I owned it so far but not then; I lost it.

Q. So that the Government took it away from you?

A. Yes, sir.

Q. The Government took the sites away from all of them along there?

A. Yes; the first time they came out and rented them.

Q. To whom did the Government rent this place where you were fishing?

A. To Winter the first time; I don't know the man.

Q. What year did Winter lease it? A. 1905.

Q. Who fished in 1906? A. I did.

(Testimony of Nels Sankala.)

Q. How did you happen to get it?

A. I got it from Tallant.

Q. The truth is that W. C. Tallant rented it from the Government for the years 1905, and 1906 and also 1907? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. So that you did not fish it in 1905?

A. Yes, sir, I did; I got it from Tallant and Grant.

Q. How much did you pay him for it?

A. We were partners together. [395]

Q. And paid the rent together?

A. Yes, sir—fifteen hundred dollars a year.

Q. So you and Tallant fished it in 1905?

A. Yes, sir, and 1906.

Q. Who fished it in 1907?

A. Tallant fished it alone. I rented my seine in 1907.

Q. So that you quit fishing in 1906?

A. Yes, sir.

Q. And Tallant fished for himself in 1907?

A. Yes, sir; I worked over there in 1907.

Q. Why didn't you put set nets in front of it when Tallant took it away from you?

A. We was working together; I worked for wages after that, the last time in 1907; I rented my horse and seine.

Q. Now, these eddies you speak of are formed by one current coming upstream and the other coming down, and they form kind of back swirls or whirlpools which run up and down the beach?

A. Yes, sir.

(Testimony of Nels Sankala.)

Q. They don't stay in any particular place?

A. No.

Q. It is pretty hard to keep up with them, with a horse? A. Oh, yes.

Q. You say you put a set net in front of these sites in 1908? A. Yes, sir.

Q. Why did you do that?

A. I was working for Mr. McGowan and he wanted me to.

Q. That is H. S. McGowan?

A. Yes, he asked me to put in a set net and he would put in the buoy, and I said I would do that.

I put the set nets in. The nets were made, one out of a piece of 6-inch mesh, and two pieces of seven and one-half inch mesh, ten ply twine, one was cotton and two of gill nets. I put [396] in three set nets, and I kept them with four buoys, and I had the set net fastened at one end to the buoy. I never gill netted in my life. I put on the cotton twine net, because it was of smaller mesh; I did not have a gill net in small mesh. I know that net made from cotton twine will gill fish; I have seen them gilled in seines. In my judgment, fish will gill in nets made from cotton twine. I kept these nets there one week. I did not catch any fish there. There was lots of fish in the set nets, but I saw the buoys come up.

Q. Name one man on the Columbia River who ever employed cotton twine in making a gill net—cotton twine that is ordinarily used for seines.

(No response.)

Q. You heard my question, didn't you?

(Testimony of Nels Sankala.)

A. What is that?

Q. Give me the name of one man on the Columbia River who ever used a gill net, web made for a seine, that is, cotton twine web. A. I don't know that.

Q. Don't you know it won't gill a fish at all?

A. I fished it gill net.

Q. You fished cotton twine in gill net? A. No.

Q. Will cotton twine gill fish in a net?

A. No; that was the first time I tried.

Q. You were trying to see whether it would do it?

A. Yes.

Q. That is true? A. Yes, sir.

Q. Did you know it would not do it?

A. I tried.

Q. Did you catch any fish in your other two set nets? [397]

A. No, I don't catch any fish.

Q. Never caught any fish at all there?

Q. You fished for two weeks?

A. Only one week.

Q. And never caught a fish?

A. I didn't stay; I don't know about the others already; I went there two or three times.

Q. You say some of the buoys were taken out by fishermen in their nets?

A. I didn't see that in the cotton net.

Q. Some of your buoys were taken out by the fishermen's gill nets as they drifted down the channel?

A. Some said they did and some said not.

(Testimony of Nels Sankala.)

Redirect Examination.

(Interrogated by Mr. DORR.)

I paid for my licenses every year; I paid the money to Mr. Hawkins, Superintendent of the Columbia River Packers' Association and I trusted him to get the licenses for me. I sold all of my fish that I caught on these grounds to the Columbia River Packers' Association. After that I fished for half in partnership with Mr. Tallant, during the last three years. I understood that the Government took charge of the island and of the shore, and that is what I meant that the Government owned it. I never heard that the Government owned the fish or the waters out there, or anything of that sort.

Here the defendants rested.

**[Testimony of R. A. Hawkins, for Plaintiff
(Recalled in Sur-rebuttal).]**

R. A. HAWKINS, a witness on behalf of plaintiff, being recalled, testified in response to interrogatories propounded to him as follows:

(Interrogated by Mr. FULTON.) [398]

I know Nels Sankala. I heard him testify that he bought the ground right occupied now by Site Number Three from the Columbia River Packers' Association through me. The facts are that when the Columbia River Packers' Association took over all the stock and the different supplies from the different companies, this was one that was put in my charge. There were two or three old seines and catboats and in order to dispose of those, I sold to Sankala for three hundred dollars or three hundred and fifty, I

(Testimony of R. A. Hawkins.)

would not say positive,—I think it was three hundred and fifty dollars. He was to fish on the ground according to my instructions and get all the revenue and pay all the expenses. The license was transferred from the Aberdeen Packing Company to me, in my name; I held the license from that time prior to the time the Government leased the ground. During that time, Mr. Sankala felt inclined once in a while to dispose of some of his fish at a half a cent more than the regular market, and I told him no, that ground was ours and he was getting full benefit, and if he did not give us all his fish I would put somebody else on the ground. He had a partner with him, Ernest Seaborg, and Ernest came to me and said, “Why can’t you give the ground to me and turn over the license?” I said I could not do it, that the company would not think about it; Sankala got the outfit for nothing, but I said “as long as he fishes on that ground and gives us his fish, he can have the ground.”

I made application to the State of Washington at that time for a license, signing the application myself, and sent the money myself. I charged that money up to Sankala’s account as he was to pay all expenses. That is about all I know of it.

Q. What were the rights that the Columbia River Packers’ Association sold, or was there any attempt to sell or convey them to Sankala?

A. None whatever, never thought about it.

All that Sankala had was merely to have the fishing privileges under my instructions, and if he did not deliver his fish to [399] my company, I would

(Testimony of R. A. Hawkins.)

have got somebody else who would ; I would have fired him off, and he knew it just as well as I did. I settled with Sankala at the end of each season. I paid him off at the end of every season myself and paid him in cash. I did not know whom he employed. He employed whomsoever he desired. At the time we owned the ground, Sankala ran it himself, with the exception that Seaborg was a kind of a silent partner of his.

Q. About what profit, if any, did he make ?

A. Some years his profits were light ; he always had a long mouth and would tell me he did not make any money ; that it all went for expenses. As a rule he did that. One season was pretty fair, and he said he had a good season and said, "I am going to give you a suit of clothes," and he did, because he had a pretty fair season ; I think he had about seven thousand dollars' worth of fish, and I think his running expenses would be about thirty-five hundred dollars. He had a couple or three thousand dollars to pull down and it was to be divided up between him and I think a man named Jonnasen who had a little ground below this and fished it under the name of Jonnasen and Sankala ; and he got some of it. Nels might have got twelve or fifteen hundred dollars for that season. The balance of the season he did not get much ; maybe five or six hundred dollars after everything was paid up.

Q. That was for his season's work ?

A. Yes, sir.

Q. Now as I understand, the Columbia River Pack-

(Testimony of R. A. Hawkins.)

ers' Association claimed the possessory right or squatter's right or whatever rights the others had to Site Number Three at the time the Government proposed to lease the same. We claimed the rights and we were never molested to amount to anything up to the time the Government sold it, and then we saw there was no more in it for us and we quit. [400]

Q. Do you remember who rented it?

A. That year I think it was Tallant.

Q. W. E. Tallant?

A. Yes, sir; he rented for three years; we did not bid high enough.

Q. In 1908? A. We got it that year.

Q. Tallant was not interfered with when he fished it? A. Yes.

Cross-examination.

(Interrogated by Mr. DORR.)

The Columbia River Packers' Association took over these concerns the year that it was organized—that is, 1899. I don't know how many concerns they absorbed; I think five or six; some of them were under my charge, together with the fishing outfits, and this was one of them. This one I speak of had been acquired by the Columbia River Packers' Association from the Aberdeen Packing Company. We got with the outfit two or three seines and I think one pretty fair fish-boat, and an old fish-boat and a lifting skiff or two. I know it was a very cheap outfit. The seines were pretty fair; they were not worthless; they could put in new parts. There were two or three of them. I could not tell the value; I never overhauled

(Testimony of R. A. Hawkins.)

them; I merely lumped them off to him. He told me that they were very poor after he overhauled them. I lumped them off to him for three hundred and fifty dollars. This included everything. This \$350.00 was for everything, whatever the price was, he took everything that he could pick up belonging to the outfit; there might have been more stuff, I don't know; whatever he said went with me. He got everything we got from the Aberdeen Packing Company, in that line, at that place, and I procured a license in my name and charged him for it, he was to pay all the expenses. At that time we paid no rent for the shore. [401] He was simply permitted to take the place of the Aberdeen Packing Company, and he continued following that until the Government leased the shore. I don't know what became of the seining outfit after that.

Q. You said that you were in possession and would have enforced your power and prevented him from selling his fish at a higher price to anybody else?

A. Yes, sir.

Q. You claimed the right to buy his fish for your price?

A. We claimed prior right to the ground at that time.

Q. And would not permit him to sell his fish outside? A. No, sir.

Q. Did he ever sell any fish outside?

A. I don't know whether he slipped away with any; I heard that he did once in awhile, to get some whiskey.

(Testimony of R. A. Hawkins.)

Q. Your idea was to control the price?

A. No, sir. He agreed to fish the grounds at the regular market price.

Q. You fixed the market? A. No, sir.

Q. Your company did? A. No, sir.

Q. Who did?

A. The fishermen's union, I think it was at that time.

Q. Then in case anybody was willing to pay more, you would not permit him to sell to them?

A. No.

Q. That was the way you had the grip on him?

A. Yes, I had the dead mortal grip on him that way.

Q. And you enforced it? A. You bet I did.

Q. That was the general policy of your company, wasn't it? [402]

Q. It was the policy of the company as a business proposition.

Q. Now as a matter of fact you charged him three hundred dollars for that old seine?

A. Yes, three hundred or three hundred and fifty dollars.

Q. Just for the old seine alone? A. Oh, no.

Q. You rendered him a bill for it?

A. No, sir; I charged him on open account.

Q. And you settled with him at the end of the year?

A. Yes.

Q. And rendered him a bill?

A. A statement of his fish and everything.

Q. In which you charged him three hundred dol-

(Testimony of R. A. Hawkins.)

lars for that old seine?

A. I don't know whether it was three hundred dollars or three hundred and fifty.

Q. What is a new seine worth?

A. Five or six or seven hundred dollars, depending on the size.

Q. Is this statement the one that you rendered him?

A. No, sir; I never rendered this statement.

Q. Isn't that the statement from your office?

A. I cannot tell.

Q. Is not that the statement on which you settled with him?

A. Well, I don't know; this looks like the statement of the Columbia River Packers' Association.

Q. Don't you know that it is?

A. If I should say, I should say it was.

Q. Is there any handwriting of your own there?

A. No, sir.

Q. Not anything you can identify that by?

A. No, sir.

Q. But you do say it is a statement from the office?

[403]

A. Yes.

Q. And covering that purchase by the first item of the statement? A. Yes, sir.

Q. And that is one seine three hundred dollars?

A. Yes, sir; that is what it says: seine from A. P. Company.

Q. And the fish-boat is billed at fifty dollars?

A. Well, the whole thing went for three hundred

(Testimony of R. A. Hawkins.)

and fifty; it says seine and fish-boat three hundred and fifty.

Q. No, it says seine three hundred and fish-boat fifty dollars. A. Yes, sir.

Q. Is there anything else in that bill which came from that old outfit?

Mr. FULTON.—That is objected to; the bill speaks for itself, and the witness did not make the bill.

A. I don't see anything outside of that.

Q. Just those two items came from the Aberdeen Packing Company? A. Yes, sir.

Q. And the rest of the items your company furnished and charged to him?

A. I think so; unless they were ordered by him through some stores and charged to him.

Q. The next item is license thirty dollars?

A. Yes, sir.

Q. This statement shows a credit of \$5,809.35 for fish for that year? A. Yes, sir.

Q. That is the amount of fish your company received from him from that place for that year?

A. Yes, sir.

Q. And if he sold any to outsiders it would be over and above that?

A. Yes, sir, but he didn't sell any outside. [404]

Q. Unless you could help it?

A. Well, I don't think he did; I have a pretty good eye on me for that kind of business.

Mr. DORR.—I ask that this statement be identified and received as Exhibit 25, as part of the evi-

(Testimony of R. A. Hawkins.)

dence of this witness.

Mr. FULTON.—No objection.

Whereupon, said document was received and marked Defendants' Exhibit No. 25.

Thereupon, each party rested, and the Special Examiner duly reported the above and foregoing testimony to the Court, and on May 5, 1912, an interlocutory decree was entered in the above-entitled suit, and pursuant thereto, the above cause was referred to M. A. Langhorne, Special Master, to take additional testimony and report his findings to the Court as to the amount of damages suffered by the defendants by reason of the injunction in this suit.

Thereupon, the following testimony and evidence was taken before the said M. A. Langhorne, Special Master, at Tacoma, in the State of Washington, on April 23, 24 and 25, 1912, that is to say: [405]

[Testimony of Frank Woodfield, for Defendants.]

FRANK WOODFIELD, a witness on behalf of the defendants, after being first duly sworn on oath, testified as follows:

My name is Frank Woodfield; I reside at Astoria, Oregon; I am a commercial photographer and art dealer; I have taken some photographs of the fishing ground in controversy in this suit; I have also taken photographs of most of the grounds on the lower Columbia River; I hold here in my hand some photographs which I have heretofore taken—some of them have been taken the last two or three years, I am not certain whether or not all were taken since 1908;

(Testimony of Frank Woodfield.)

they are all correct photographs from certain points looking certain ways and are photographs of fishing operations in front of Sand Island, in the Columbia River, that is, along the shore of Sand Island.

Thereupon, counsel for defendants offered said photographs in evidence.

To the introduction of said photographs, the plaintiff, by its attorney, objected on the ground that the same was immaterial and does not show, or tend to show, the measure of defendants' damages.

Said photographs were received and marked in evidence as Defendants' Exhibit "A," "B," "C," "D," and "E" and are hereunto attached and made a part hereof.

[Testimony of Amon Markham, for Defendants.]

AMON MARKHAM, a witness on behalf of defendants, after being first duly sworn on oath, testified as follows:

My name is Amon Markham; I reside at Ilwaco, Pacific County, State of Washington, and am by occupation a fisherman, and outside of the time I was deputy sheriff of Pacific County, I have been engaged in fishing for about 34 years in the waters of the Columbia River, Grays Harbor and Shoalwater Bay; I was deputy sheriff for Pacific County for 4 years, and with the exception of those 4 years, I have been engaged in the last 34 years in fishing for salmon fish and other fish in the Columbia River, Willapa Harbor and Grays Harbor, and also in Alaska; I [406] have fished in the waters of the Columbia River for the last 28 years, and for the last

(Testimony of Amon Markham.)

28 years, I have been acquainted with Sand Island, in the Columbia River, and the waters in front of it, and I am also acquainted with the waters in front of sites numbered 1, 2 and 3, on Sand Island, and I have fished in front of said Sand Island for salmon fish; that the names of some of the species of salmon fish in the Columbia River are steelheads, bluebacks, and Columbia River salmon; that I am acquainted with Mr. H. S. McGowan, Mr. J. P. Coyle, and Mr. Erick Lindstrom, the defendants in this case, and I have *been* their locations south of Sites 2 and 3, Sand Island.

Q. I want you to tell me this: South of and in front of sites, known as 2 and 3, Government sites on Sand Island, tell us what you know about the waters in the Columbia River at those places being valuable or not valuable for the catching of salmon fish.

Mr. FULTON.—I object to that as immaterial, irrelevant and incompetent; not evidence as to the measure of damages.

Mr. WELSH.—Q. You may tell us about it; you may answer the question.

A. Well, now, then, a question: Do you want me to answer where it is, the location—in what depths of water?

Q. You may do that.

A. I set the location, the place in the inshore, location stake, at one fathom, 600 feet, and 300 feet on shore.

Q. You place the defendants' location, the inner end of their location?

(Testimony of Amon Markham.)

A. Yes, sir, 6 feet—one fathom.

Q. One fathom of water? A. Yes, sir.

Q. At extreme low tide?

A. Yes, sir, on the bank. [407]

Q. I say, at the extreme low tide you mean six feet? A. Yes, sir.

Q. Their locations were not inshore any nearer than that? A. Absolutely not.

Q. And extended out in the water for about what distance?

Mr. FULTON.—I object to that as immaterial. The only question in issue in this case is what damages you suffered by reason of our interference with your operating certain alleged set nets.

Mr. WELSH.—Q. You can answer the question. (Last question read.)

A. One hundred fathoms, I should judge—600 feet. There are great quantities of salmon fish in the waters in front of said sites and in that particular location, and that such salmon is of commercial value.

Q. What was the market value of salmon during the year 1911—season of 1911?

Mr. FULTON.—I object to this, not within the order; all these matters were gone over thoroughly on the part of the defendant, and they are not within the order.

Mr. WELSH.—You may answer the question.

A. Well, do you mean to ask the question, provided where we fish upon the ground?

Mr. FULTON.—He is asking as to the commercial

(Testimony of Amon Markham.)

value of the salmon in the water.

A. Thirty-three and a third on the ground.

Q. While in the water?

A. After they are caught.

Mr. WELSH.—Q. After they are caught?

A. We get five on less than five pounds, and seven and a half for big salmon.

Q. You get how much per pound?

A. Five for small salmon and seven and a half for large salmon. [408] A. Yes, sir.

Q. Per pound? A. Per pound, yes, sir.

Q. That was the market value during 1911?

A. Yes, sir, market value for 1911, so help me God.

Q. Wasn't the price of salmon six cents?

A. No, sir, some of them got six cents; we got five.

Q. Have you ever operated set nets?

A. Yes, sir; I have operated set nets in Shoalwater Bay, Columbia River, and also Baker's Bay.

Q. Have you ever— A. But I say five cents.

Q. You got five cents for all?

A. No, no, that is on small salmon; I correct my statement, six cents and seven and a half.

Q. Do you remember what the price was in 1910?

A. In the Columbia River?

Q. Yes, sir. A. Yes, sir.

Q. What was it?

A. Six cents, cold storage they were seven and a half cents.

Q. Cold storage? A. Yes, sir.

Q. Assuming that in the year 1911 the drag seine

(Testimony of Amon Markham.)

that was operated by the plaintiffs caught 363 tons of salmon fish—

Mr FULTON.—What year?

Mr. WELSH.—For the season of 1911. Or was it 360 tons, how many tons of salmon fish, in your opinion and judgment, could be caught on those locations, in those waters, with set nets?

Mr. FULTON.—I object to that on the ground that the witness is incompetent, has not shown he has any knowledge that a set net would catch a fish on these grounds. He has never known [409] or heard of anyone operating set nets there.

Mr. WELSH.—You may answer.

A. If I had the privilege of running a set net, given the jurisdiction of Sand Island, I certainly know what I could do. I know what I could catch as a practical fisherman; I know what I could do.

Q. You do? A. I certainly do.

Q. Then you may tell me.

A. I believe if I had the proposition of operating set nets there during the months of June and July, I could catch in the neighborhood of 35 tons.

Mr. FULTON.—I move to strike out this testimony as immaterial, irrelevant and incompetent, and not the measure of damages.

Mr. WELSH.—Q. You mean for each set net?

A. No, no.

Q. Now, suppose that the drag seine caught 360 tons?

A. I would operate as much as I would be allowed.

Q. Suppose you could operate set nets there—

(Testimony of Amon Markham.)

A. And give me the jurisdiction—

Mr. FULTON.—You mean give him the whole ground?

Mr. WELSH.—Yes.

Q. How many tons of salmon would you catch in your set nets?

Mr. FULTON.—I object to that as incompetent, not within the issues and not the measure of damages.

A. Why, if I was to operate according to the way the ground is laid out, 18 to 36 set nets, I believe that I would almost catch as much as I would with a drag seine.

Q. In other words if you were permitted to operate and fish those grounds in front of Sites 2 and 3 with set nets, that out of those waters you would catch nearly as much as you would with a drag seine?

[410]

A. Absolutely.

Q. And if the drag seine caught 360 tons you would catch that many.

Mr. FULTON.—I submit that Mr. Welsh should take the stand.

Mr WELSH.—I know it is leading; I will reframe that.

Q. Suppose that you had the right to fish with set nets in the waters of the Columbia River in front of Sites 2 and 3, and suppose that during the year 1911 that a drag seine caught in the neighborhood of 360 tons, how many tons of salmon, if any, would you catch with your set net?

(Testimony of Amon Markham.)

Mr. FULTON.—I object to that as incompetent and immaterial, and not the rule for the measure of damages.

A. The appliance that I would use, I would catch approximately over two-thirds of what they catch—over two-thirds.

Q. You would catch over two-thirds of what was caught? A. Yes, sir, I would guarantee that.

The SPECIAL MASTER.—Does he mean two-thirds as many tons?

A. Yes, sir.

Mr. WELSH.—Q. If they caught 360 tons you would catch two-thirds more?

A. Yes, I would guarantee that, I know that.

The SPECIAL MASTER.—Q. Two-thirds of 360?

A. Yes, sir.

Mr. WELSH.—You said over two-thirds, didn't you?

A. Yes, sir.

Q. You said you was not familiar with the waters in front of the sites? A. I certainly am.

Q. Have you fished those waters?

A. Well, I should say yes; I have answered that question once; very familiar with it.

Q. Did you ever operate set nets in the Columbia River? [411] A. Why, yes, I have.

Q. For catching salmon fish? A. Yes, sir.

Q. From your knowledge and experience as a fisherman you may state whether or not in front of Sites 2 and 3 in Sand Island—the waters of the Columbia River—set nets could be operated for the catching of

(Testimony of Amon Markham.)

salmon fish. A. I should say yes.

Q. Would it or would it not be practicable to fish in front of these sites with set nets for the catching of salmon fish?

A. Undoubtedly; give me the privilege and I will show you.

Q. In the operation of set nets in front of those sites, from your knowledge and experience as a fisherman, and from the knowledge and experience that you have of the grounds, the location in controversy, you may state whether or not it would be practicable to fish those locations without going upon the tide lands, or the outlands in the operation of your set nets.

A. Do I understand you to mean to say could I land a seine inside without going ashore; is that what you mean?

Q. That is practically what I want to know. You may answer that.

A. Why, certainly; I have done it in the water this deep (indicating).

Q. Nearly to your shoulders? A. Yes, sir.

Q. Well, now, in the operation of set nets there, for the purpose of catching salmon fish, would it be necessary for you to go upon the tide land?

A. No, sir.

Q. Tell me—

A. We do not catch them on the drift logs, we catch them in the water.

Q. Tell me how. [412]

A. We manipulate them with anchors, the use of

(Testimony of Amon Markham.)

pulleys or the use of a collock.

Q. How do you get the fish out of your nets without getting on the land?

A. We have a boat; and you surely would not run a boat in among the rift logs.

Q. Would you go on the tide lands?

A. Why, certainly not; no fish run upon the tide lands.

Q. Explain to the Court how you would operate your set nets without using the lands, tide lands, or whatever you call it, above extreme low tide.

Mr. FULTON.—I object to that as incompetent and immaterial, and not within the issues.

A. Why, in the first place, if I was to put out set nets I would use a collock, made of rock, and we place them on and anchor our set nets.

Q. That did not quite answer my question. I want to know how you would operate those nets, how you would get your fish out of them, and how you would market your fish? A. With a boat.

Q. Without going upon the lands or tide lands.

A. Never go on land at all—absolutely on no land, we would go on the boat, gasoline boat. We could not fish there with a sail-boat now, so far as the water and everything is concerned, we would go there with a gasoline boat.

Q. Now, you have stated that you know those waters? A. I certainly do.

Q. And those locations? A. I certainly do.

Q. And from your knowledge and experience as a fisherman, and knowledge and experience you have

(Testimony of Amon Markham.)

had in the operation of set nets, do you mean to say that those locations in the waters of that river in front of those sites, could be fished [413] with set nets?

A. Why, certainly, you could use set nets; give me the show.

Q. During the many years that you have been engaged in fishing in the waters of the Columbia River, do you know what the value of fishing locations are?

A. You mean the rental value?

Q. I mean the rental value.

Mr. FULTON.—I object to that.

A. Thirty-three and a third per cent.

Mr. FULTON.—I object to that as incompetent and immaterial. It is not what other fishing locations of this same character are worth.

Mr. WELSH.—Q. You say $33\frac{1}{3}$ per cent?

A. That is the rental proposition on individual gear.

Q. I want you to explain that to me fully.

A. If you are not—if I rent a gear from the cannery it is $33\frac{1}{3}$ per cent profit to them; $66\frac{2}{3}$ per cent goes to the manipulator, the man who manipulates the game.

Q. Operates it? A. Yes, sir, operates it.

Q. Suppose for the purpose of illustration—suppose I had exclusive rights to fish in the water of the Columbia River in front of these two sites, and I wanted to give or rent to someone the privilege for a year of operating on those grounds, what rental would I receive?

(Testimony of Amon Markham.)

Mr. FULTON.—I object to that on the ground that the witness is incompetent; he has not testified he knew what the value on the rental was.

Mr. WELSH.—Q. I will ask you if you know what the rental values are.

A. Thirty-three and a third per cent.

Mr. FULTON.—Q. Do you know of any set net sites being rented [414] on the lower Columbia River? A. I do.

Q. Where?

A. Why, take it on the grounds—the Grant and Dillon grounds.

Q. Grant and Dillon grounds, set nets?

A. No—

Q. I am talking about set nets, Mr. Markham. Please keep that in mind, set nets. I do not want to talk about anything else. Please answer the questions; confine yourself to set nets. Do you know of any man renting or paying anything for the purpose of operating a set net on the Columbia River? A. Yes, sir, I have.

Q. Who? A. I can show you—

Q. I said who? A. Mr. Brown, for one.

Q. Who did he rent it from?

A. I don't know, Mr. Fernburg, I believe.

Q. He rented a set net location from Fernburg?

A. Yes, sir.

Q. Where? A. I don't know.

Q. That was about 1860 or '70?

A. In all probabilities it was.

Q. It might have been 1860 or 1870?

(Testimony of Amon Markham.)

Mr. FULTON.—I object, the witness is incompetent.

Mr. WELSH.—Q. Mr. Markham, do you know where parties have the exclusive right to a fishing location—

Mr. FULTON.—I did not understand the question.

Mr. WELSH.—Q. Where parties have the exclusive right to a fishing location and rent to someone else for a year, do you know what amount they pay for the rental value? [415]

Mr. FULTON.—I object, in the first place the witness is incompetent, and in the second place, the proposition is a set net at the particular place; the witness is incompetent and the question is incompetent.

Mr. WELSH.—We have a right to fish these locations.

Mr. HADLEY.—We are trying to determine what the rental value is.

Mr. WELSH.—Q. You may answer the question. I asked you if you knew what the rental value was,—was paid for fishing locations in the waters of the Columbia River.

A. Well, now, I answered the question. I want to demonstrate the fact this way: The price or value is put upon it but naturally it is $33\frac{1}{3}$ per cent of the valuation of the fish—what we pay, provided we furnish the gear.

Q. Do I understand you to mean this, that the rental value is one-third of the gross catch of the location? A. Yes, sir, yes.

(Testimony of Amon Markham.)

Q. It is one-third of the gross catch of the location?

A. Yes, sir.

Q. If you are going to rent a fishing location from me, you determine the value, what it will be per annum, of one-third of the gross catch?

A. Yes, sir.

Q. Has that been the rule?

A. That has been the rule.

Q. And that applies to all kinds of locations?

A. It don't make any difference whether you are fishing with a gill net, a drag, or anything else, where the company gets behind you itself.

Q. That is the rule? A. Yes, sir.

Q. That is the fact? A. Yes, sir. [416]

Mr. FULTON.—Let the witness testify.

Mr. WELSH.—You appreciate the fact—

Mr. FULTON.—He can testify satisfactorily without you leading him.

Mr. WELSH.—Q. Then, Mr. Markham, suppose that these locations in front of Sites Two and Three, that during the season of 1911, we will say, there were 360 tons of salmon fish caught, what would you say then the annual rental value of these locations are?

Mr. FULTON.—I object to that as incompetent and immaterial. It is a hypothetical question and not based on any evidence in this case.

A. I should think fifty per cent of the amount put in would—

Q. Would be the reasonable market value?

A. The reasonable market value.

Q. Rental value? A. Yes, sir.

(Testimony of Amon Markham.)

Q. Per annum?

A. Yes, sir, I should think so; and I would be willing and glad to do it.

Q. Now, Mr. Markham, with reference to the number of fish that would be caught for the various years, from July, 1908, on the fishing locations in controversy, would you say the catch of the fish and the valuation would compare with the year 1911, the fishing season of the year 1911?

Mr. FULTON.—I object to that as immaterial and incompetent.

A. Well, if I was to figure—if I was to go out and put out the appliance that the fish—the appliance on Sand Island, I would figure on $66\frac{2}{3}$ per cent. That ain't what they done, but my own individual appliance, fifty.

Q. What do you mean by $66\frac{2}{3}$?

A. That is what I would give.

Q. That is what you would give for the rental value? [417]

A. Yes, the rental value, and give them the same appliance; but if I am manipulating myself I would do it, I would give fifty.

Q. If there was 360 tons of fish caught during the fishing season of 1911, how many tons would you say could be caught in the fishing season of 1910?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial. The witness is incompetent.

Mr. WELSH.—Q. Is there any way of determining, if you know the catch for one year, is there any

(Testimony of Amon Markham.)

way of determining the catch for another year?

A. It is subject to the facts, you could not tell just what you could do; you might put in more appliance.

Q. You do not quite understand me. Assuming that there was about 360 tons of salmon fish caught there in the fishing season of 1911? A. Yes, sir.

Q. How many tons, could you say could have been caught in 1910 with the fishing gear?

Mr. FULTON.—Same objection.

A. Why, I believe in my mind I could catch more fish than anybody I have seen. Is that a fair question?

Q. That is not answering my question.

(Last question read.)

A. Nothing.

Q. You mean to say then—do I understand you to say that if there was 360 tons caught on these locations in the fishing seasons of 1911 that you would not catch anything there other years?

A. No, absolutely not; I could double the amount, yes. I understand the question—you bet I can.

Q. Then assuming that there were 360 tons of salmon fish caught in the fishing season of 1911 on these locations, is there any [418] way of determining or judging of the number of salmon fish that would be caught in the prior year?

A. Well, now—what are you going to put a man to?

Q. Were you familiar with the run of fish on the Columbia River in 1911? A. Yes, sir.

(Testimony of Amon Markham.)

Q. How did that compare with the run of fish in 1910?

A. Never compared with 1910; we had a bigger one last year.

Q. How much bigger? A. Lots bigger.

Mr. FULTON.—Q. You mean you had a better run in 1911 than in 1910? A. Yes, sir.

Q. You had a bigger run in 1911 than you had in 1910? A. Yes, sir, I can show you that.

Mr. WELSH.—Q. How did they run in 1909 compared with 1910? A. Small again.

Q. Small in 1910? A. Yes, sir.

Q. 1908? A. 1908 was better than 1909.

Q. 1908 was better than 1909?

A. Yes, sir.

Q. How would it compare with the run of 1910?

A. Apparently about the same.

Q. Then in 1908, the run of 1908 was practically the same as 1910? A. Yes, sir.

Q. 1910 was equally as good, if not better, than the run of 1911? A. Just about.

Q. By run you mean the number of fish—

A. Number of fish caught on the grounds where the fishing grounds are. [419]

Cross-examination.

I used to own quite a number of fish traps or set nets, but I own none now. I am working for myself; I am a fisherman and have my own boats and nets and am engaged in gill netting and set netting. My nets are on the Nasel River—that is, over on Shoalwater Bay, in Pacific County, Washington. I have oper-

(Testimony of Amon Markham.)

ated set nets in the Columbia River, in Baker's Bay all the way from Fort Canby to Fort Columbia. The reason I quit was that when a man finds out that when he sets a net out he quits. I have not yet quit, however, I am still operating set nets in Baker's Bay at the time the season opens. I have one set net in Baker's Bay now. I operated it last year. It is located down at what they call "Oklahoma Channel" in Oregon. I caught five salmon in it last season. I did not operate it, however, the whole season. I think I operated it three or four nights in the month of May. I don't exactly know why I quit—I paid my license, but I operated only three or four nights. The reason why I quit was for the reason that I thought it was in the way and I thought it would justify me in doing it. Oklahoma Channel is in front of Sand Island. It is on the west side of the island. The water is different on the west side than on the south side. The current is swifter on the south side than on the west side.

Q. Now, supposing, Mr. Markham, that under the laws of Oregon, that anyone could go in there and put in a set net any place he wanted to in front of that land, how much would you give for the privilege of operating a set net in front of it?

A. May I answer the question?

Q. Answer any way you want to.

A. I place the—shall I answer, Mr. Welsh?

Mr. FULTON.—Q. Answer the question. I want you to answer my questions.

Mr. WELSH.—I will have you tell me.

(Testimony of Amon Markham.)

Mr. FULTON.—You can tell him after, when you get on the outside.

(Last question read.) [420]

A. What would I give?

Q. Yes. A. Where this set net I put—

Q. I am speaking of the set net placed by Mr. McGowan in front of the sites numbered 2 and 3 on Sand Island; supposing at those points where you saw those set nets anyone who had a license—

A. I never said that.

Q. Wait a minute. Suppose anyone who had a license, had the right under the laws of Oregon to put all the set nets he wanted to in there, and you would not have the exclusive right, how much would you pay to put one set net in there—how much would you pay for it?

Mr. WELSH.—Objected to as incompetent, irrelevant and immaterial, for the reason the Court has decided in this case that we had the exclusive right to operate those set nets and to fish on those locations.

A. If I had the opportunity of working those grounds?

Mr. WELSH.—I wish to make the further objection that the question states a state of facts not analogous to the case here.

(Last question read.)

A. That is a question of how much I would pay, exclusive right?

Q. No, no. Just the same right as anybody else to put one in any distance you wanted to; suppose under the laws of Oregon there was no lateral passage; if

(Testimony of Amon Markham.)

you put a set net in anyone would have a right, see you making money, to put one in in front of you any distance they saw fit, what would be a fair price to operate a set net under those conditions?

Mr. WELSH.—We also make the objection, in addition to the ones we have made, that the question assumes the law to be other than it is. The law in any State would not permit the interference with an official location by another person, but that equity [421] would enjoin such interference; and the question assumes a state of facts which does not exist; and it is not analogous to any of the facts in this case.

A. Why, in answering that I think a man is justified, where he pays his license to the State—

Q. I want you to tell me in your judgment whether a set net location under those circumstances would be worth anything at all.

A. Why, it certainly is.

Q. Just keep your seat now. How much is it worth if anyone else has the right to cork it?

Mr. WELSH.—Same objection.

Q. Suppose anyone would have the right to cork you, what would be the value of your set net location?

A. What do you mean?

Q. Don't you understand corking, what corking means? A. I certainly do.

Q. Suppose that any man under the laws of the State of Oregon who had a license could put a set net within 25 feet on either side of Mr. McGowan's set nets, as you saw located there, how much would they be worth per annum?

(Testimony of Amon Markham.)

Mr. WELSH.—The defendants make the same objection.

Mr. FULTON.—I understand the same objection goes through to that.

A. There is no such a law on record.

Q. You swear there is no such a law in Oregon?

A. Yes, sir; 300 feet is what the law is.

Q. You are just as sure of the fact that is the law in Oregon, that no set net can be placed within 300 feet of you, as you are of everything else you have testified to in the case?

A. That is according to my understanding. I do not want to buck anything unless I understand it.

Q. Don't you understand my question? [422]

A. I am saying I understand 300 feet is the law.

Q. I am simply saying, assuming it to be a fact that under the laws of Oregon there is no provision against putting one set net right up alongside the other, providing the two people have licenses, assuming that is the law, how much would the right to operate a set net in front of Sand Island, in front of Sites 2 and 3, be worth?

A. Why, there is no question; I cannot answer any such question as that.

Q. You cannot answer it?

A. Certainly not; if you have no law, how can I answer it?

Q. Assuming that under the law—

Mr. WELSH.—Same objection.

A. I cannot answer where there is no law.

Q. I am assuming there is no law, would that right

(Testimony of Amon Markham.)

to operate one set net there be of any value at all—or any number of set nets there—as long as anybody else had a right to operate—

A. Yes, sir, if you can under the law, if the law is behind me.

Q. There is no—

Mr. WELSH.—Same objection.

Mr. FULTON.—Q. Assuming there is no law which prohibits one set net from corking another under the laws of Oregon, what would be the value of a set net location there?

A. Never saw such a law.

Q. I do not care whether you did or not. You answer that question, or I want to know the reason why. I am simply trying to ask you, Mr. Markham; you will answer that question.

A. How am I to answer, Mr. Welsh?

Mr. WELSH.—Q. Do you understand the question? A. I do not.

Mr. WELSH.—Let me put the question. [423]

Mr. FULTON.—Let us adjourn until Mr. Langhorne comes.

Mr. WELSH.—The witness does not refuse to answer the question.

A. I did not refuse to answer anything in fairness.

Mr. FULTON.—Well, we will wait until after lunch, and I will get an answer to that question.

An adjournment taken.

The cross-examination of AMON MARKHAM was resumed by Mr. Fulton, as follows:

Q. The question I was trying to explain to you, Mr.

(Testimony of Amon Markham.)

Markham, before we adjourned was, just supposing if under the laws of Oregon no one could get the exclusive right to operate set nets in front of Sand Island, Sites 2 and 3, and that after one had a set net there, we will suppose there was no law against any other party coming in and setting a net anywhere he wanted to, what would you say as to that right being of any value to anybody?

A. You want me to answer the question in recognition amongst the fishermen?

Q. No, answer the question I asked.

Mr. WELSH.—Answer the question in your own way.

Mr. FULTON.—You can answer the question and make any explanation afterward.

A. Yes, subsequently we have; assuming rights, we have a right.

Q. I am not asking that at all. You know what that question is? A. Yes, sir.

Q. Answer it.

A. I will answer the question this way. I think we have a right, we have.

Q. Yes?

A. And every man has a subsequent right.

Q. Supposing he don't have that right, what then?

A. We use that. [424]

Q. Assuming you do not; if you do not have that right? A. We make that a law among ourselves.

Q. Supposing a lot of fellows came in and would not listen to that and put in set nets anyhow, and the Court said they had a right to, what then?

(Testimony of Amon Markham.)

A. I don't know what would happen.

Q. Don't you know it would be of no value at all?

A. I know it would be as much value to me as anyone else.

Q. Would it be valuable to anybody else if a party came in and does the same thing you are doing?

A. They are subject to their right, we appreciate that.

Q. I am not asking that.

A. Haven't I answered your question?

Q. No, you have not. I do not care what you think your rights are. If under the law of Oregon—and that property is in Oregon—if under the law of Oregon anyone had the right to go in there and put their set net in front of yours any place they wanted to, what then would your right to operate a set net there be worth?

A. Not if they got jurisdiction.

Q. It would not be worth anything?

A. No, I don't say that.

Q. What do you say?

A. We fish among each other.

Q. I do not care about that. I am saying, supposing some people had the same right to do it and that they did do it, what then?

A. Then a man would take his chances.

Q. Yes; and you might have 100 set nets there?

A. In all probability.

Q. Would your set net right be of any value with 100 set nets in there? [425]

A. I think so.

(Testimony of Amon Markham.)

Q. How much would you pay for the right to operate one set net there, we will say? Supposing we would give you a right to operate nine set nets there, yet anybody else could put in 100 more if they wanted to?

A. I do not think the State of Washington—

Q. I do not care what you think about it. How much would you be willing to pay for a right to operate a set net there provided 100 other men came in there and put their nets alongside of you, wherever they wanted to?

A. Well, you are—

Q. Answer the question. A. What question?

Q. Don't you understand the question?

A. No, I don't. How much will I pay for the ground?

Q. Supposing now that I had a set net there in front of Sites 2 and 3; supposing you had nine set nets; and I should come to you and say, "I have a set net in front of Sand Island"—and you had the money to pay for it—and I should say, "How much will you give me for this set net location?" Now, you have these nine set nets, and there are 100 other men have set nets along there too, and they have a right there to operate their set nets the same as you and I—how much would you pay me for mine?

A. With a guarantee that I am not going to be molested?

A. You will be molested.

A. Then I could not put a valuation on it.

Q. Do you know whether it is worth anything or not?

A. Sure it is.

(Testimony of Amon Markham.)

Q. How much is it worth?

A. Well, I would take my chances on running, if I had the south of Sand Island; I would be willing to pay \$2,800.00. [426]

Q. And let anybody else come in that wanted to?

A. Yes, sir.

Q. Let 100 men come in there?

A. Don't make any difference.

Q. If they put a set net in front of you ten feet, it would make no difference to you?

A. I would run my chances.

Q. Then, there is about 7 feet then, isn't there?

A. Yes, more than that.

Q. So you would have 9 set nets, and if the other set nets were set about 10 feet apart there would be about 200 of them along there, and you would be willing to pay \$2,800.00 for one?

A. Yes, exclusive right.

Q. Did you ever operate a set net there?

A. I never did on the south of Sand Island.

Q. You do not know whether you could catch a fish or not? A. I absolutely know I could.

Q. You never tried it? A. No, sir.

Q. You never saw anybody else operating it?

A. Yes, sir, some gentleman from Chinook, three of them; I don't know their names; they operated set nets there.

Q. You do not know their names or the year they operated? A. No, sir.

Q. All hearsay with you?

A. I know they did; it is hearsay. I never oper-

(Testimony of Amon Markham.)

ated one, if I had I would tell you.

Q. You do not know of your own knowledge of anyone else having operated there?

A. I know they did.

Q. You heard they did? A. Yes, sir. [427]

Q. You do not know the names of the men?

A. No.

Q. Did you ever hear of their names?

A. I have heard talk of them.

Q. Never heard anybody mention their names?

A. No, sir.

Q. You never saw them there?

A. I never was over there when they were operating.

Q. You tried to operate one set net on Sand Island? A. Not on the south side.

Q. On the west side?

A. On the west side, I have, yes, sir.

Q. During all that time you have never known, of your own knowledge, of anyone attempting to operate a set net there?

A. As I told you, I know they have been, but I don't know the gentlemen's names, never made it my business to know.

Q. Never even heard the names of the gentlemen?

A. I know they have been.

Q. Something in the air has told you?

A. Nothing in the air at all.

Q. You do not know the names of the men?

A. I never made it my business to know, Mr. Fulton.

(Testimony of Amon Markham.)

Q. You say you never even heard the names of the men? A. I say that I don't know their names.

Q. You never heard their names, that is what you said? A. I don't care about that.

Q. You never heard their names?

A. I don't know, I don't care to.

Q. You never saw them? A. No, I have not.

Q. You gill netted along there—how many years have you been gill netting along the shores there of Sand Island? [428]

A. Well, I have been away from Sand Island when I was four years in Alaska, and I am four years in South Bend; outside of that I have been gill netting all my life and trapping.

Q. During all that time you never saw a set net there? A. Absolutely none on the south side.

Q. The only people that used the waters in front of Sand Island for fishing purposes were those engaged in gill netting and those engaged in seining?

A. Well, now, I won't say that, because I told you I don't know these people.

Q. I am talking about what you saw.

A. No, I absolutely didn't see it.

Q. During all the years you were there you never saw anyone attempting to fish the waters in front of the south shore of Sand Island, other than gill nets?

A. On the south side?

Q. On the south side, other than gill netters and seiners.

A. No, I never saw a set net there, for practically the last twelve years the south shore of Sand Island

(Testimony of Amon Markham.)

has been used as seining grounds.

Q. Now, during that time how many set nets do you know of, of your own personal knowledge, not what you have heard, were operated on the lower Columbia River?

A. On the lower Columbia River?

Q. Yes.

A. Why, I do not know, there is a question I won't answer, because I don't know.

Q. Well, can you recall one?

A. No, I would not answer that—only one of my own, I have operated a set net a few days during the early spring, that is all.

Q. Just a few days?

A. Yes, sir; I would not tell you something I do not know. [429]

Redirect Examination.

I consider Oklahoma Channel as inferior for fishing to the south shore of Sand Island. The fish are more numerous on the south shore. If I should be permitted to operate a set net on the south side of Sand Island, I know as a practical fisherman that I could catch salmon fish. If I had the front of Sites 2 and 3 in the Columbia River, I think I would make about \$7,000.00. I only operated my set net in the Oklahoma Channel three or four nights and caught five salmon, and I discontinued, because it would not pay, and I did not consider Oklahoma Channel a good fishing location.

Thereupon, counsel for defendant asked the witness the following questions:

(Testimony of Amon Markham.)

Q. Suppose that during the year 1911, fishing season of that year, and prior years, in front of Sites 2 and 3, in the waters of the Columbia River, south of Sand Island, there were no set nets excepting the defendants', what in your opinion was the annual rental value of that location?

Mr. FULTON.—I object to that as incompetent and immaterial, not the proper measure of damages.

Mr. WELSH.—Q. Do you understand the question?

A. Yes, sir. Now, to answer the question as a practical fisherman, give me the privilege of fishing this location.

Q. I said, assuming there were no corking, that you had the exclusive right—no nets there but yours; based on that?

A. Twenty-eight hundred dollars, I would give for the ground.

Q. Each year? A. Yes, sir.

Q. For each one?

A. For each one of the locations; mark you, there would be no competitor, you see?

Q. I assume that. Now, take it during the year, say, from July, [430] 1908, during the fishing season, including the year 1911, was there any person or persons corking south of Sand Island, in front of Sites 2 and 3?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial.

A. Was there corking?

Q. Yes.

(Testimony of Amon Markham.)

A. You mean to say, laying out their nets outside of the "Republic"?

Q. Was there any interference there with parties fishing by other parties fishing?

A. Every fisherman gets the right to net.

Q. What is the custom of fishermen, respecting the rights of locations of each other?

A. You mean the drift net?

Mr. FULTON.—Set net.

Q. What has been the custom?

A. Three hundred feet.

Mr. FULTON.—I object to that as immaterial.

Mr. WELSH.—Q. I will first ask you, do you know the custom of fishermen on the Columbia River with reference to whether or not they respect the locations of each other? A. I am sure they do.

Mr. FULTON.—I object to that as incompetent.

Mr. WELSH.—Q. What has been the custom of the fishermen on the Columbia River with reference to respecting the locations of a prior locator?

A. According to law.

Mr. FULTON.—I object to that as incompetent.

Mr. WELSH.—Q. I do not care about the law.

A. According to law—this law requires them to respect it.

Q. What has been the habit or custom of the fishermen on the Columbia River with reference to respecting the prior location [431] of the other fisherman; do they cork him or do they leave him alone?

A. Why, certainly, they don't cork him, they leave

(Testimony of Amon Markham.)

him alone; they respect each others' rights. Go out upon the water and if a man don't respect the other man, where would you be? Of course, they respect each other.

Recross-examination.

Q. So you think that you would be willing to pay \$2,800.00 a year for each set net that Mr. McGowan had in front of Sites 2 and 3 on Sand Island during the year 1908, 1909, 1910, and 1911. You think that would be a fair rental value, do you?

A. I think so.

Q. He had nine of them, that you remember?

A. I don't know what he had. If you give me that location I will give you that money.

Q. That would be \$25,200 if he had nine of them?

A. I don't know anything about what he had.

Q. You said they were 300 feet apart?

A. I don't know where they were.

Q. Set net locations are supposed to be 300 feet apart? A. That is the Oregon law.

Q. In 3,000 feet there would be nine locations?

A. Yes, sir.

Q. That would be \$25,200, which you think would be a fair price to pay for the rental right in front of Sand Island? A. Yes, sir.

Q. That is your judgment?

A. Yes, sir. I did not say I would pay \$25,000.00 for the entire ground—I said I would pay \$2,800.00 for each Site One, Two and Three on the ground, that is, each site. I mean each set net. The reason why I didn't put a set net on these grounds is, that I have

(Testimony of Amon Markham.)

[432] no money to drive these locations and put in these set nets, but I would give this money if I could. It costs probably \$1,000.00 to put in one set net location and operate it. The only reason why I did not put in a set net location was that I could not raise the \$1,000.00, and I did not ask anyone to loan it to me. I do not know whether I could have borrowed the money or not, and I never inquired from anyone whether he would back me or not. I have figured many times about putting a set net in there, but I never talked with anyone who had the money to put in a scheme like that. During these years, I have had money to put in a hundred of them, if I wanted to get the money. I would not put it in myself, for the reason a fisherman is not going to advance himself. Of course, I put in my own set net in the Oklahoma Channel.

Redirect Examination.

(By Mr. WELSH.)

Q. Mr. Markham, knowing that the plaintiffs were using and occupying this territory south of Sand Island, would that fact deter you and others from attempting to put in fishing gear there?

A. Why, certainly.

Recross-examination.

(By Mr. FULTON.)

Q. Then, people all knew that the Columbia River Packers' Association was using this as seining ground, didn't they? A. I suppose they did.

Q. McGowan knew it, didn't he?

(Testimony of Amon Markham.)

A. I don't know.

Q. So McGowan, when he attempted to put those set nets in there, was not respecting the prior rights of other fishermen, was he?

Mr. WELSH.—We object to that question and move to strike it out for the reason it assumes a state of facts which the Court in [433] this particular case has decided against; for the reason that the counsel is assuming in his question that the Columbia River Packers' Association had a prior right to fish there, and that they were fishing when the defendants put in their fishing gear; whereas, the Court has found as a matter of fact that the defendants had a prior and exclusive right to fish there, and that the plaintiff, the Columbia River Packers' Association, was a trespasser, and that it did unlawfully tear up and destroy the defendants' fishing gear, and that it came on to the ground subsequent to the time of the location of the defendants' fishing gear; and the question is entirely immaterial.

A. You have plied so many questions against me—

Q. You said the reason why you did not put—one of the reasons you did not put a set net in front of Sites 2 and 3 was because the Columbia River Packers' Association had a prior right? A. I did.

Q. Or was using it as a fishery; didn't you say that? A. I did not.

Q. You are positive you did not say that?

A. I am positive I did not.

Q. Didn't Mr. Welsh ask you this question: One of the reasons why you did not attempt to put in a set

(Testimony of Amon Markham.)

net was because the Columbia River Packers' Association had a prior use? A. No.

Q. He did not? A. No.

Q. Who had?

A. I don't know; I say I had no right there.

Q. But that they had the prior use?

A. If they had the privilege of the ground, I had no right there, and I could not put in my money, as a poor man and a common fisherman go to work and tire them out. [434]

Q. That was the only reason, was it?

A. Subsequent to the fact that I didn't have the money of my own to buck them people, McGowans and the combine, or either of them.

Q. You say it has only been the last 12 years they have used this for seining ground at all, and before that it was not occupied. Why didn't you use a set net there before that?

Mr. WELSH.—I object to that as being immaterial.

Mr. FULTON.—Q. Before that, when nobody was occupying it. Why didn't you put a set net in there then?

A. I would be a nice "howdy-do," a poor fisherman going to work bucking a company like McGowans or the combine.

Q. I am talking about before McGowans, or what you please to call the "Combine" had anything to do with it. Why didn't you put a set net in then?

A. Why didn't I?

Q. That is the question. A. "Holy mother."

(Testimony of Amon Markham.)

Q. That was the only reason then—you did not want to make any money? A. No.

Thereupon, counsel for defendants moved to strike out all the testimony of the witness with reference why he did not put in fishing gear south of Sand Island, on the ground that it is wholly and entirely immaterial and on the ground that the Court has found in this case the defendants had the prior and exclusive right to do that.

[Testimony of Ralph Grable, for Defendants.]

RALPH GRABLE, a witness produced on behalf of the defendants, after being first duly sworn, in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. J. T. WELSH, of Counsel for Defendants.) [435]

My name is Ralph Grable; I reside at Ilwaco, Pacific County, State of Washington; I have lived there 23 years; I am 34 years old; I am a fisherman by occupation; I have been fishing since I was 15—that would make it about 19 years. In the first place, I was a trap fisherman for Columbia River salmon on the Columbia River. My fishing operations have not altogether been on the Columbia River. I have fished on Shoalwater Bay, or Willapa Harbor, as you may call it. I have fished on the Columbia River since I was 15 years of age. In the fall of the year, I was up there in Willapa Harbor; in the summer, I fished on the Columbia River. In the first place, I was using traps, and then set nets, and then gill nets, and then purse nets.

(Testimony of Ralph Grable.)

The only difference between a gill net and a set net is determined, as I can see it, one is made fast by appliance and the other drifts as the tide takes it, either to or fro. The difference is that a set net is anchored, and a gill net is not anchored—that is the only difference. The difference between a gill net and a seine is that a seine surrounds the fish and drags in to the shore, where a gill net the fish goes with his head into the mesh and there he stops.

I am familiar with the location of Sand Island, and I am familiar with fishing operations in front of Sites 2 and 3. I have fished there every season since 1901, and during that time, I have been familiar with the run of fish there. I fished there during the season of 1911, or in that immediate locality. There was an extra run of fish during the season of 1911—an extraordinary run of fish during that year. I should say an increase of 20% over the previous year. The year 1909, as near as I can remember, I think it would not exceed one or two per cent either way, and it might exceed 5% either way as to the year 1908. Not keeping track of the whole business, not having that business in mind altogether, but I do not think that the season, I mean the [436] fishing season, exceeds five per cent between 1908 and 1911.

The Columbia River Packers' Association fished the location south of Sand Island in front of Sites 2 and 3 during the year 1911. I was around there considerable time. I saw them taking fish from there in large quantities.

(Testimony of Ralph Grable.)

Q. Have you in your experience as a fisherman known of the leasing of fishing locations by the holder to any other person?

A. Yes, sir, I have had a lot of experience in that, both on Baker's Bay and in the Willapa Harbor district.

Q. Did you lease locations yourself?

A. I have, sir.

Q. For what kind of fishing? A. For salmon.

Q. I mean for what kind of gear.

A. For trap locations; I have never leased any seining grounds whatever.

Q. Have you ever leased any grounds to be used for set nets? A. No, sir.

Q. Have you known of others doing it?

A. Yes, sir.

Q. Are you familiar with the custom among fishermen on the Columbia River as to the price that shall be paid for the leasing of fishing locations?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial, and not the proper measure of damages.

A. I think I am, sir.

Q. Will you state what that rule is?

A. Yes, sir.

Q. What is it?

Mr. FULTON.—I object to that as incompetent, irrelevant and immaterial, not within the issues—not the measure of damages. [437]

A. I think that any man that leases ground from another or the man that furnishes gear for another

(Testimony of Ralph Grable.)

man to fish with is the same as ground; we consider it that way. The man who furnishes ground without gear, he is entitled to $33\frac{1}{3}$ per cent.

Q. Of what?

A. Of the gross catch, and the man that furnishes the gear and grounds both, he gets 50 per cent; that has always been my way of leasing.

Q. You mean he that takes one-third of the catch—

A. And furnish his own gear.

Q. He takes the equivalent of the value—

Mr. FULTON.—I object to that as leading and suggestive; the witness has not so testified.

Mr. HADLEY,—That is leading, I will admit

Q. What do you mean when you say, Mr. Grable, that the lessee of a location pays one-third of the catch if he furnishes his own gear?

A. Furnishes his own gear.

Q. What do you mean when you say he pays one-third of the catch?

A. Means one-third of all the fish he catches. He furnishes the gear and they furnish the ground. That is what I mean.

Q. If the gear is furnished by the lessor, he then pays how much of the catch? A. Fifty per cent.

Q. Do you know how many fish were caught at that location last year by those who operated it, south of Sand Island?

Mr. FULTON.—That is, of your own knowledge.

A. I don't know that; I only know what I saw; that is all I can swear to, and I was on Sand Island

(Testimony of Ralph Grable.)

during this big run of fish while they were delivering the fish.

Mr. HADLEY.—Q. You say you were told how much the catch was? A. Yes, sir. [438]

Q. Were you told by an officer of the Columbia River Packers' Association? A. No, sir.

Mr. FULTON.—That is a conclusion.

Mr. HADLEY.—Q. Assuming *if* it to be a fact that the catch aggregated 360 tons of fish, what would be the rental value of those locations for the year 1911?

Mr. FULTON.—We object to that as incompetent, irrelevant and immaterial.

A. Under the rules that has been set forth altogether ever since we have been on the Columbia River for 23 years—we have been there fishing on all sides of the river—it has never been less than one-third of the gross catch for the man that furnished the outfit.

Q. Assuming that the catch was the amount I have stated, then what would you say was the rental value?

Mr. FULTON.—I object to that.

A. Thirty-three and a third would be the rental.

Mr. HADLEY.—Q. Thirty-three and a third per cent of the amount?

A. Of the gross catch, if it was one or ten.

Q. You mean if there were 360 tons—if there was that many caught? A. Yes, one ton or ten tons.

(Witness continuing:)

I know the market value of fish caught during the year 1911. I was fishing the whole season from

(Testimony of Ralph Grable.)

the first day. The market price for salmon last season (1911), small ones up to 25 pounds, up to the 15th day of August, six cents, and for salmon weighing over 25 pounds, seven cents and a half. That is what my statement shows for the fish I caught.

Q. Were you familiar with the fishing at that location, or with conditions as they existed during the year 1910? [439]

A. I hope to be, not being a seiner at that time, I was a gill netter, and used to fish on these grounds. Not being a speed fisherman, or what we call a "hard case," I generally aim to get low water near these seining grounds.

Q. What would you say was the rental value of this location during the season of 1910?

A. I would say they were within—

Mr. FULTON.—I object to that as incompetent.

A. (Continuing.) Within 20% in 1910 of what they was in 1911.

Mr. HADLEY.—Q. Then, what was the value during 1909?

A. Well, I was fishing there, also, and it would probably vary five per cent in that season, according to my fish receipts.

Q. Vary five per cent from what, do you mean?

A. From 1909 to 1910; 1910 was five per cent better.

Mr. FULTON.—Better than in 1909? A. 1909.

Mr. HADLEY.—Q. What about the value of the location during the year 1908?

(Testimony of Ralph Grable.)

A. I would say 1908 was five per cent better than 1909.

Q. Is it practical to operate set nets at the location south of Sites 2 and 3?

A. Why, it certainly is practicable.

Q. Are those locations valuable for set nets?

A. I only wish I had the opportunity.

The Columbia River Packers' Association, in making its catch in 1911 employed seines which were usually called "drag seines"—they also call them "beach seines"—it is one and the same thing, commonly called a drag seine. A drag seine is a net that is made of twine and cotton line, lead and corks, any length of depth that a man has a mind to make it, to fit his ground; he makes the seine to fit his ground, if it is a foot deep where he starts to 20 feet where he ends. He is supposed to [440] have one-third more web than he has water, and he lets the seine out according to his ingenuity, to his scientific line of fishing. They have different modes of fishing, one lays it one way and one lays another. You lay those out in particular according to the tides, and the man that lays the seine out the best is the man that is going to catch the most fish. When the seine is filled with fish, it is dragged to the beach into shallow water by horses and men on the last end of the seine, the men handle it and the horses are taken off; and the men get on the lead line and ride the lead line and haul it by hand, and another man he will do the cork line. You land the fish in the water, not on the land; the fish are in the water.

(Testimony of Ralph Grable.)

You can take these fish from the seine out of the water into a boat just as well as you can from the seine on to the land. It does not necessarily have to have 500 feet of bluff or anything like that to land these fish in. The fish are dragged into the shallow water. In operating a set net, you take the fish out this way: you simply have your set net and when the slack water—when the water is slack, in having the net tied, when the current is running over the net it is going to be all the same as in line. The greater the current is on it the more it is going to be tight. If you have it where you can set net it will do fishing in any kind of water. It is a proven thing—set net any day will do fishing in any kind of gear you can put there; you do not need to go on dry land to fish it, fish do not swim on dry land. A set net sets in the water. You have a set net in the water where the fish get at it and they are going to get in there and you do not go in the water to take them out. They are caught in their gills by the net by their own power driven into it. To take them out, you simply lift up the net and take the fish out; slip it off their head, put them in the boat and make away, and that settles it. The net is still fishing all stages of the time; it is the most perfect way of catching fish known on the Columbia [441] River in all stages of the tide.

Q. Having knowledge of the drag net operations conducted there last year, how many fish would you say the set nets that could be operated in that location (referring to Sites 2 and 3) would catch as com-

(Testimony of Ralph Grable.)

pared with the number caught by the drag net?

To this question, counsel for the plaintiff objected on the ground that it was incompetent and immaterial, and not the proper measure of damages.

A. Well, I should say that if a man could fish with set nets, there on that ground, with the amount—to take the same amount of gearing and put into set nets and put it on to that ground where these drag seines were, that the set nets would catch anyway within seventy per cent of the drag seines. The same amount of gear in length, you take five or six seines 350 fathoms long made up into set nets 20 to 50 fathoms long and set them on that ground, and if I run them myself, I could make more clear money than I could with drag seines.

In estimating the value of these locations for the year 1911, I would say that it was seventy per cent of the value of the location for a drag seine. That would be my estimation of the business. To take the same amount of gear, the same amount of gear that there is in the drag seine, and put it into set nets, and put on these same grounds, it would catch anyway seventy per cent of what the drag seines would catch. If you start from the first of the season, it would be when the water is muddy. The gill nets would catch within thirty per cent of the fish the seines would catch.

I was there during the year 1908 and the years following. I saw on these set net locations the set nets of the defendants in this case. They were in position for operation. They were in fine condition

(Testimony of Ralph Grable.)

when I saw them. I do not know what became of them. I just happened to be fishing there, gill netting; I didn't pay any attention, well, it was none of my business, in fact. I do not [442] know when they were taken out, and I do not know anything about that personally, only I know I saw the nets there on the ground while I was gill netting. I did not see Mr. McGowan there, or the defendants there operating the nets. They were there—the nets were there—and it did not seem to me anybody was bothering them, because fishing where those nets were, if anybody would make around with drift in there, they are going to lose their nets on the "Republic"—that is the old wreck, you know that. Anybody who makes around that drift in flood or ebb tide, he is going to lose his net. I know nothing of any interference in the operation of such set nets. This is practically a fishing ground for everybody, that is conceded, but there were no other set nets around there, and there were no other drag seines, excepting those of the Columbia River Packers' Association. There was no corking of that location during any of those years, by the operators of set nets, or any other fishing devices, to my knowledge.

Q. How do you fix the market value of those fishing locations?

A. How do I fix the market value of them?

Q. Yes.

A. Why, we always consider that any trap location or anything like that should be worth what it would catch in two seasons, that is allowing the man

(Testimony of Ralph Grable.)

to have one season to pay for his gear, and one to pay for his work; that is the way we figure it.

Mr. WELSH.—Q. By “we” you mean fishermen?

A. Yes, sir.

There is no comparison in value between the location south of Sand Island and locations in other parts of the Columbia River. That location south of Sand Island is so much superior there is no comparison. The fish run abundantly there. They certainly run abundantly there, or one would not catch 35 tons in one day. I have seen that done by the Columbia River Packers with drag seines. I do not know the date, but I was right there and saw it done. That [443] was in 1911. I remember that it was last year, in the month of August, I remember that, just the date I don't exactly remember. I was there on other days during the year 1911, and I saw the Columbia River Packers catching fish there, but I don't remember exactly the amount, from 24 to 25 tons per day. I was there at different days, but I don't remember how many fish they caught. I was there quite frequently, and they were catching fish every day I was there, and I saw the fish, and if I am not mistaken, I have Mr. Hawkins' word for it that they had 38 tons that day. Mr. Hawkins is one of the officers of the Columbia River Packers' Association. He is manager for that association in Ilwaco, and is manager of the Columbia River Packers' Association's seines on Sand Island, and had charge of them there. I have heard him say at different times how many fish

(Testimony of Ralph Grable.)

they caught there. I refer to the catch of 1911. I have been there most every season two or three days at a time when the big run of fish comes. We go when the fish comes in; we know when they are there just as well as the seiners. I have made estimates of the comparison between the two seasons.

Cross-examination.

(Interrogated by Mr. G. C. FULTON.)

I am working for myself and own my own gear, and deliver fish to P. J. McGowan and Sons. The manager of that company is H. S. McGowan.

Q. Now, over in Washington there is a law providing for the protection of fish-trap locations, isn't there? If a man establishes a fish-trap location, the law says no one can come within a certain distance of him; if he complies with that law he is protected so long as there is a lateral passageway of 900 feet on each side? A. Yes, sir. [444]

Q. End passageway of 30 feet, I believe; that in that distance no one can operate any kind of structure for the purpose of catching fish? A. Yes, sir.

Q. And there is no cash ever paid for the rental of ground, as I understand you to say, or rate of rental on these locations?

A. The man that takes the license, he is the man that owns the location.

Q. You say that the general custom is a certain per cent is charged; you had reference when you made those observations, in regard to the percentage to trap locations, did you not?

A. Any fishing ground.

(Testimony of Ralph Grable.)

Q. You had reference to set nets?

A. I have never rented any seining grounds; it is simply for set nets ground, or anything like that.

Q. We will get at that. Who did you ever know on the Columbia River to rent a set net location?

A. Well, I have known fellows, but I cannot bring them into court to-day.

Q. I do not want them here, I want their names.

A. Their names is Frank Shipley.

Q. Who is Frank Shipley?

A. He is in South Bend, Washington.

Q. Where was this set net? A. At Oregon City.

Q. At Oregon City? A. Yes, sir.

Q. I should have confined my remarks—I intended to confine them to the lower Columbia River. Name one man on the lower Columbia River that you know of renting grounds for set nets purposes during all the time you have lived down there?

A. (Witness hesitates.) [445]

Q. As a matter of fact, there has not been a set net operated on the lower Columbia River in the last 20 years. On the Columbia River proper.

A. There is any amount of them there at the present time.

Q. On the Columbia River?

A. Any amount of them operated all during the winter months, during the fishing season.

Q. Aren't they in the sloughs and rivers?

A. In the Chinook River, in the bay.

Q. In the Chinook River?

(Testimony of Ralph Grable.)

A. What they call Chinook is in front of Chinook town.

Q. During the fishing season, I am talking about.

A. That is the fishing season, when you can fish.

Q. That is what you understand as the fishing season?

A. When you can fish it is the fishing season.

Q. You understand that? A. Yes, sir.

Q. During the entire fishing season are those set nets operated?

A. During the entire winter fishing season; there are different fishing seasons.

Q. The canneries don't run.

A. The canneries don't, but the fishers do; this is a fishing season.

Q. During the run of fish, we will say during the spring fishing season on the Columbia River, are the only times that the canneries run—is the big fishing season? A. From May to September.

Q. From May to September? A. Yes, sir.

Q. That is the big fishing season? A. Yes, sir.

Q. During that time are any of these nets operated? [446] A. Beg your pardon?

Q. During that time are any of these set nets operated on the Columbia River?

A. Why, there are certainly plenty of them when you get above Meglers—

Q. I am talking about the lower Columbia River, below Meglers. A. Below Meglers?

Q. Yes.

A. I have never made a practice, but I have fished

(Testimony of Ralph Grable.)

with set nets there myself; but, under the circumstances, I, when I fished it, was not on rented ground. We fished with our set nets on ground already licensed for traps; we put set nets on that. When the boys went to put their traps in we took the set nets off, never thinking of making a permanent business of set netting on this ground.

Q. Why not?

A. Because the trap could catch more than the set net on the same ground.

Q. The trap could catch more than the set net?

A. On the same ground in clear water, but a set net would catch more than a trap on the same ground in muddy water.

Q. It won't do it down on the lower Columbia River? A. In muddy water it will.

Q. It won't do it in the season?

A. It won't during the season.

Q. Name one man operating set nets during the entire season on the lower Columbia River.

A. You mean beyow Megler's?

Q. Yes, sure.

(Witness hesitates.)

Q. I have been waiting for you for about five minutes.

A. At the present time I cannot recall anyone. I will tell you [447] I don't know anyone fishing with set nets.

Q. Only do it incidentally?

A. Yes, sir.

(Testimony of Ralph Grable.)

Q. Just a little play fishing? A. Perhaps.

(Witness continuing:)

I never heard of anyone operating a set net in the waters surrounding Sand Island, excepting P. J. McGowan and Sons, and these were the ones that I saw there, as I have testified. I saw these were in fine shape. I saw two set nets myself. I did not molest these set nets to see whether or not there were any fish in them or not. If Mr. McGowan testified he never caught any fish there, in my estimation, somebody had been in his nets. I stated that if a gill net got into the current and ran down on top of the "Republic" wreck, the net would simply be lost. He would lose his net on the wreck. The tide would take him down there. There is certainly a tide at certain stages of the tide. I should judge its speed to be about six miles an hour. That is a pretty swift tide. That is the ebb tide. I do not think the flood tide exceeds three miles per hour. Fishermen can come up on the flood tide and they lose their nets right there. A year ago, I saw fourteen or fifteen nets hung there on flood tide. It is not the severeness of the tide—it is the way the tide sets. The tide practically sets and drifts on the "Republic"—flood and ebb tide and it will go to it. The "Republic" wreck is between Sites 1 and 2 of the seining grounds. The gill nets drift down close to the island and then they have to take up. That is a pretty swift current there. If I were to fish set nets, I would fish them as near the island as possible in order to get out of the current where there is plenty of current a little closer. I would go not

(Testimony of Ralph Grable.)

closer to a fathom of water at low tide and from that to three fathoms. [448] There is plenty of eddy there. It is certainly an eddy along the island. The eddy goes out as near as I can remember for 200 fathoms. They do not have to be put in close. That certainly would be fishing at the time this current is at six or seven miles an hour. It would not take the fish out of them, that is, the current would not. That is, if you know how to set nets. The nets would not be set across the current, always place the set nets with the current, up and down with the current. I have seen them set that way right here on the Willapa River. If you set nets on the Willapa River as long as I have, for the last five or six years, you will never set a net across the current to catch fish. I have set nets on Baker's Bay, in the Columbia River, just to get some to eat. We never made it a business. I never said that the set net was the most perfect way of catching fish on the Columbia River. I never said anything of the kind. That I swear to positively. If I did make such a statement, I was very badly mistaken.

Q. Now supposing, that under the laws of Oregon, anyone could go in there and put set nets in front of Sand Island, anyone that wanted to—there is no lateral passageway at all—would it be of any value to any particular person for set nets there?

Mr. HADLEY.—We object to that as incompetent and immaterial, for the reason such a state of facts did not exist from the time of this injury.

Mr. FULTON.—That state of facts did absolutely

(Testimony of Ralph Grable.)

exist under the laws of the State of Washington, and I do not think Judge Hadley will deny it, he ought not, anyway, as a lawyer.

Mr. HADLEY.—Our objection is based on the ground there is no evidence here showing that there were such interfering locations made during the period for which we are ascertaining these damages.

[449]

Mr. FULTON.—The Court takes judicial notice of the laws of the State of Oregon in this case.

Q. What is your answer?

A. I don't see but what one man would catch just as many fish as another; they come there so thick.

Q. If a man put his set net within 20 feet of yours he would catch just as many fish?

A. I can't see any difference; fish don't come one way, they come all directions.

Q. So that you think it would not make any difference if there were 1,000 set nets in front of Sand Island, Sites 2 and 3, one set net location would be just as good if there were none there?

A. I didn't say that; this is what I say: If the nets that are put in, what we term a fair show, one net will be as good as another; one net will do just as good as another one day with another.

Q. That was not my question. You have no right to assume that. My question was this: Assuming that it is the law in Oregon that one set net locator is not bound to respect another, and that after you have established a set net location under the laws of Oregon—we will assume that to be the case—another man

(Testimony of Ralph Grable.)

can come along and plant one in front of you?

A. I consider one just as good as the other.

Q. The question I asked you is this, would then a set net location be of any value in front of Sand Island under those conditions?

A. It certainly would.

Q. Well, we are coming around to the main proposition; one set net location in front of Sand Island is worth just as much as if it were alone, as if there were a thousand set nets within the immediate vicinity, within ten or twenty feet of it?

A. I don't see any difference. [450]

Q. You swear to that? A. Yes, sir.

Q. How in the name of God could fish get there if they were absolutely surrounded by set nets?

A. You have never fished with gill nets?

Q. I will go on the stand later on, and you may cross-examine me. How would fish get there if set nets are entirely surrounded with other set nets?

A. That is just as easy for the fish as it is for me to answer the question.

Q. He has got his eyes on the set net and he will come there?

A. You would not think a man out there would get fish, but he would get as many as the man on the other side of him.

Q. Don't you know there are more rows on the Columbia River because one gill netter puts his nets down in front of the other fellow, within 50 or 60 feet of him? A. They don't pay any attention to that.

Q. There is no such a thing as corking?

(Testimony of Ralph Grable.)

A. No, sir, we have overcome that.

Q. In seining,—seining would be the same thing?

A. Yes, what is the difference?

Q. Then the operator of the lower seining ground would not interfere with the upper one at all?

A. I don't believe that.

Q. A man seining in front of Site No. 1 on Sand Island would not interfere with Site No. 2?

A. No, sir, Site No. 2 will catch more than Site No. 1.

Q. You swear to that? A. Yes, sir.

Q. Don't you know that the number of years they have operated there has been more fish caught on Site No. 1 than 2 and 3 together?

A. I know better than that. [451]

Q. You swear to that? A. Yes, sir.

Q. You swear positively to that? A. Yes, sir.

Q. Now, just tell us how you know.

A. Simply because what they call Site No. 1 is part of Site No. 2; that is the whole reason of it. Where they catch the fish is practically on Site No. 2, but they land them on Site No. 1; for those catching fish on Site No. 1, that I don't know anything about.

Q. That is your reason? A. Yes, sir.

Q. The Columbia River Packers' Association did not own Site No. 2 until the year 1912—Site No. 1, until 1912? A. Why did they fish there?

Q. They never fished Site No. 1.

A. That is a funny thing, what were they doing with boats and nets?

Q. They were landing on Site No. 1 during the

(Testimony of Ralph Grable.)

years you are talking about? A. Yes, sir.

Q. You are just as sure of that as anything you are talking about?

A. I am. I was right there and know the business. I seen it sink down and they could not get it to shore; what do you call it?

Q. Henderson and Olson rented that ground?

A. Yes, sir. What was the Columbia River Packers' seines on that ground for?

Q. They fished it then?

A. They fish it, they certainly do.

Q. Clear down on the other fellow's ground.

A. Yes, sir, certainly; they were down on Henderson's and Olson's ground. [452]

Q. All the time?

A. No, sir. When they came down they tried to fish it there.

Q. That is your testimony? A. Yes, sir.

Q. Now, you never have during all the time you have fished on the Columbia River operated a set net on the lower Columbia River during any full fishing season? A. Never have.

Q. You have always worked for somebody else on a trap? A. No, sir.

Q. Never owned a trap of your own?

A. No, sir.

Q. Then, all the trap-fishing you ever did was under the employ of someone else?

A. With my father, on a rented location.

Q. And the rest of the time you have been gill netting?

(Testimony of Ralph Grable.)

A. And purse seining and drag seining.

Q. Where did you drag seine?

A. On Sand Island, on what you call ground No. 2.

Q. Why didn't you set net it then?

A. Why, that was not—I didn't own the ground, I was simply working there.

Q. Who were you working for?

A. W. C. Brumbach.

Q. You were his foreman?

A. No, sir, I was one of his crew.

Q. You did not suggest to him that it would be cheaper to operate a set net?

A. No, sir, none of my business.

Q. You never did operate a set net there, nor anybody you heard of outside of McGowan?

A. No, sir, not that I heard of. [453]

Q. Who else did you work for on Sand Island?

A. I fished that one season.

Q. For Brumbach? A. Yes, sir.

Q. That is the only time? A. Yes, sir.

Q. That is the only time you ever worked on Sand Island?

A. That is the only time I ever worked on Sand Island, yes, sir.

Q. You have been gill netting ever since?

A. Yes, sir, and purse seining.

Q. Where did you purse seine?

A. Right near those grounds.

Q. When? A. In 1906.

Q. You were working for those purse seiners?

A. I happened to be one of the owners of the rig

(Testimony of Ralph Grable.)

myself. We fished there three seasons along the land, from 1906, 1907 and 1908.

Q. How far out can you run a set net there in front of Sites 1, 2 and 3?

A. You are off your base there.

Q. How far out can you run a set net?

A. How far out can you run a set net?

A. Yes. You would not run it out at all?

A. I did not run any set nets out at all; I run out parallel with the current.

Q. The current you say is very swift there?

A. Yes, sir.

Q. You never tried it out there?

A. I will show you a theory. You take a gill net and drop it out on this seining ground, parallel with the current; it is the best way to catch fish. [454]

Q. Your set net is never out straight, it is always crooked?

A. That don't make any difference. It is supposed to hang with the current; if you hang the net itself it will hang with the current.

Q. That is the theory upon which you figure a set net will work? A. Yes, sir.

(Witness continuing:)

I have tried set netting, operating the net up and down stream in the Nasel River, where the current is just as swift as that in the Columbia River. It is not true that the only place where set nets are operated on the Willapa Harbor is an eddy. I set it out right in the straight current.

Q. Now, if this set net right was of such value why

(Testimony of Ralph Grable.)

haven't you put a set net in there?

A. That has never been—it is not in conjunction with my business.

Q. It is not your business? A. No, sir.

Q. How many fish does the gill netter ordinarily catch each season?

A. I should judge in the last—I only *just* myself as a common fisherman—they should catch—they should average ten ton to a boat.

Q. Ten ton for one entire season? A. Yes, sir.

Q. You testified a while ago that you saw them catch with seines on Sand Island, in one day, 35 tons, and that you could use the same set of material in set nets, and you could catch within 30% of 35 tons in one day, which would be about 25 tons.

A. I only gave you that as my supposition.

Q. Are you willing to tell me now, Mr. Grable, that you would [455] overlook a proposition like that where you could catch in one day with the same equipment you ordinarily use in employing a gill net, three times as much as you could catch in a whole season, therefore you would not take advantage of it?

A. You see, a man is never—I am never around looking for trouble or animosity with anybody. I want to go where I am perfectly free from all complaints of anybody. I don't want to go in there and put in set nets or anything to have any lawsuits or trouble with anybody.

Q. Why should you think you would have a lawsuit?

A. Well, because these big companies sees a man

(Testimony of Ralph Grable.)

making a few dollars, then they try to get him out.

Q. Do they bother you about gill netting; you are making money gill netting? A. Yes, sir.

Q. Do the big companies bother you there?

A. No, not particularly.

Q. Why do you think they would bother you by putting set nets in front of Sand Island?

A. Never wanted to put any there.

Q. Didn't care to make 25 tons of fish a day?

A. Because it was not—that was not my line of business at all.

Q. You do not know much about set netting?

A. Yes, I know all about set nets.

Q. I cannot understand why a golden opportunity like that should be permitted to slip away.

A. Because it was taken ahead of me.

Q. Who took it from you?

A. Why, this P. J. McGowan had the seining ground there; that ground in the first place belonged to them, and we acknowledged rights, the same as we had with traps on any other ground. We acknowledged their rights, that is their ground. A man stakes off a location, that is his ground—a man takes up [456] the seining ground—that is his ground.

Q. That is the reason you did not go there was because McGowan had it?

A. Didn't make any difference whether it was McGowan's, or whose it was, so long as they were the first persons there; it don't make any difference as to whether it is McGowan's, or the Columbia

(Testimony of Ralph Grable.)

River Packers' Association's, if they were the first people there we acknowledge their right, same as a man taking up a homestead or anything else.

Q. That was the theory of it? A. Yes, sir.

Q. That is the reason why you did not put in the set nets? A. It certainly is.

Q. That was the only reason?

A. I don't know of any other.

(Witness continuing:)

They do not fish drag seines during the muddy water, or when the water is muddy. There is no question about that. They might try it, but they don't catch any fish. I noticed how Mr. McGowan had his set net locations; they were right across the current. I suppose they catch fish that way as well as any other way—not so well, but you can catch a fish on slack water. The current would not carry them out. If a man knows how to set a net, the current would not carry the fish out. He would take the fish out during slack water—within a hour of slack water is when the fishing is best. If he did not take the fish out in slack water, perhaps some of them would be gone. These set nets were placed practically in the gill netter's drift. It is a fact that the Columbia River Packers' Association frequently have to wait for gill netters to pass by in front of their grounds before putting out their net. This has occurred very frequently during the last three years. These gill nets come close to the [457] shore—they certainly do.

Q. I thought you said they could not get in on ac-

(Testimony of Ralph Grable.)

count of the wreck?

A. They know danger when they see it. Don't you know enough to jump a ditch when you come to it? They know enough to pick up the nets. When you come to the wreck you lose the nets.

Q. But they go by this ground occupied by Mr. McGowan's set nets, if he operated the way he started in to, and would be right on the main gill net drift? A. Not necessarily.

Q. I thought you said a while ago—

A. You tried to make me out a liar.

Q. No, sir, I would not insinuate that. I want to treat you perfectly, as a gentleman; I claim to be a gentleman myself; but I misunderstood you. I understood you to say the set nets he had were right in the main gill net drift.

A. I said that the gill nets drift there.

Q. Now, Mr. Grable, didn't I tell you that when the Columbia River Packers' Association was operating their seines there they had to wait many, many times during the last three years on account of the fact that the gill netters were right in close there to the shore, and they drifted down there habitually, isn't that true? A. Yes, sir, certainly is.

Q. That is the best drift on the Columbia River for gill netters, that is, in front of Sand Island, in front of the seining grounds, and you know it. Now, tell the truth about it, you know it is true?

A. No, the most of them, perhaps a few gill netters would drift on the seine current, but the main

(Testimony of Ralph Grable.)

gill net fishing is outside of the "Republic" wreck.
[458]

Q. Isn't that the principal gill net drift down in front of this particular island, in front of these sites? A. Why, you might say that—

Q. Answer the question.

A. It is not in very near the vicinity of Sand Island, the main gill net drift is not there. It was in the length of a seine outside of Sand Island where the main gill net drift is, that is, I should judge. There is a few gill nets come in, they come scattering everywhere, but the main gill net drift is more than a seine length outside of Sand Island.

Q. Then the Columbia River Packers' Association is not bothered with gill nets at all?

A. You *take* a certain extent know nothing about it to amount to anything.

Q. Nor so much as they were a little while ago. A little while ago they were bothering seriously, but not as much now as they were then?

A. They are obliged occasionally to wait for gill netters to drift out of the road, a minute or two. I said it was not on the main drift.

Q. Didn't you also say that the gill netters had to wait for the Columbia River Packers' seines to get out of the way? A. Certainly.

Q. You say as a fisherman—

A. I say that is not the main gill net drift, on those seining grounds.

Q. In front of these Sites 2 and 3, particularly, is the main gill net drift on the Columbia River—the

(Testimony of Ralph Grable.)

best on the Columbia River?

A. What do you mean?

Q. I mean—

A. On the same ground where the same— [459]

Q. I mean, they start their gill nets up above, a great distance up, and they drift down, as you said awhile ago. The current sets in there, as you said awhile ago it did, and you cannot go back on that.

A. It will go the length of a seine outside.

Q. You testified awhile ago that this current—the main drift of the current—was right up against the island from this “Republic” wreck. It is a fact that gill netters put their gill nets in the water above and the current drifts them down and they sweep the shore of Sand Island on the south and come down there by the hundreds.

A. They don’t come down by Sand Island unless they lay out from Sand Island. They have to lay out from Sand Island to make the long sweep of Sand Island; and the main layout on that drift—that is, from Pt. Ellice down to the head of the island, and a net laying out there at Pt. Ellice, or from McGowan, or Ft. Columbia, or from the head of the island, where most people lay, will almost always drift outside of the “Republic.” They might come within a few fathoms of the end of the “Republic,” but any net will catch the “Republic,” provided the tide takes you there, but not on this particular seining ground, they don’t come there.

Q. That is the main drift down this channel of the river from Pt. Ellice? A. Yes, sir.

(Testimony of Ralph Grable.)

Q. You do not want to change the statement that the current drifts them in there?

A. They will draw towards the "Republic" wreck.

Q. That is down along the beach?

A. Here is the beach here, and the nets come from this direction; you call this the wreck, they will lay out their net here and it will draw them this way (indicating). [460]

Q. We cannot take that.

A. That is the proposition.

Q. Didn't you say awhile ago that if McGowan left his nets in there the gill netters would have to take up their gill nets or run over *then*?

A. Yes, I said that.

Q. What made you say that if it was not in the drift? I cannot understand you, you get me all confused.

A. I said he would have to take up his net or he would catch that set net.

Q. If it was not in the drift, why should he have to take up his gill net?

A. Has he any right to put it there?

Q. I would not argue with you, you beat me in the argument. I want to know why you made that statement, if your net don't drift down and these set nets were not in the road, what do you mean by saying that the gill nets would have to take up the gill nets, or they would snag them on the set nets. What did you mean by that statement?

A. I simply meant this, that if a man seen an ob-

(Testimony of Ralph Grable.)

struction in his road, if he is drifting, he is going to pick up for it.

Q. You tried to give us the information that it is not in his road. If it was not in his road, why in the world did you make that statement, and lead me to believe that it was? A. (Witness hesitates.)

Q. You do not care to answer that. I will not insist on it. That is all.

(Last few questions and answers read by the stenographer at the request of Mr Welsh.)

Mr. WELSH.—Counsel asks about 15 questions at the same time and the witness cannot tell which one to answer. We insist he should indicate which question he wishes the witness to answer. [461]

The WITNESS.—He has asked me that 1000 times.

(Last question read as follows:) “You offered to give us the information that it is not in his road. If it was not in his road why in the world did you make that statement, and lead me to believe it was?”

A. What was in his road?

Mr. WELSH.—The fish nets, he means. He wants to know if they were in the road.

Mr. FULTON.—I object to this, counsel cannot cross-examine his own witness.

A. If the State gives a man the right to set—have a set net ground on these grounds, anybody coming in there drifting has to pick up his nets for these nets, hasn't he?

Q. That is the question I asked you.

Mr. FULTON.—That is practically the question I

(Testimony of Ralph Grable.)

asked you. That is just exactly the proposition. I don't think you have a right to read my mind and interpret my question.

Redirect Examination.

(Interrogated by Mr. WELSH.)

I say there is an eddy close to Sand Island on the south. I should judge it to be a good place for set nets. I say this eddy extends out for a distance of 200 fathoms, it varies in different stages of the tide; it works in and out. The main drift channel and course used by fishermen with drift nets is out in the river to the south of these set net locations, and to the south of the "Republic" wreck. I should judge the main gill net drift is 250 fathoms from the dry land in all stages of the tide, while the set nets of the defendants, as near as I can remember, extended out between 60 and 100 fathoms. I didn't pay strict attention; I know this was about their length. They did not extend out of the main drift channel of the gill netters.

Q. If that is true, then would it necessarily interfere with [462] gill net fishing on the Columbia River?

A. Not with the majority, perhaps a few could go in there and say that this encountered them, you see, You might go in there with your nets and lay out where the set nets are, but the main drift is outside of the "Republic," which I saw the nets were inside of the end of the "Republic."

Q. Mr. Fulton asked you to name one man that operated a set net the entire season. Now, I will ask

(Testimony of Ralph Grable.)

you to name one man who operated a fish trap the entire season.

A. Why, I don't know that I could. You mean in the Columbia River?

Q. Columbia River.

A. On the Oregon side—Sand Island. There is the Markham brothers—D. & D. Markham. I can name a man who operated a drift net during the entire season. I don't know of any person operating a drag seine from the beginning of the season to the end of the season. The reason for that is that conditions are favorable during certain portions of the season, and I could not name a single individual or corporation on the Columbia River that operates a drag seine during the entire fishing season.

(Interrogated by Mr. HADLEY.)

Fish traps and seines and gill nets, you must remember, are altogether different kinds of fish gear. It is acceded that the gill nets of the Columbia River catch 80% of the fish caught on the river. There is certainly fine fishing grounds on the south of Sand Island for any kind of gear. Outside of Sand Island, on the lower Columbia River, there are many valuable fishing locations occupied by traps, there is no room for set nets, that is, on the most favorable locations, if the law allows you to fish the ground—the ground is there providing you have the right to fish it. That part of the law I don't know anything about. These locations south of Sand Island are among the most valuable. [463] The fish run into set nets with both tides. The salmon go in all direc-

(Testimony of Ralph Grable.)

tions, in shore and off shore, and with the tide and against the tide.

Q. If a set net is located in one place and another is located near it, on one side of it, the fish will run into the inner net from all directions as well as from the direction towards the other net?

A. I do not see any difference which side the net is on, whether on the right hand or on the left hand. There is a difference in the time of the year. In the first of the year, you will catch more fish on the ebb tide than you will on the flood tide, and the last part of the season you will catch more on the ebb than you do on the flood.

Q. You stated to Mr. Fulton your view that one set net location or set net would catch as much as another. I would like to have you explain what you mean by that, I don't know that I fully understand you.

A. One set net will catch as much as another. I will explain it in this way, that if you set four nets in a line, either upstream or downstream, if the salmon go this way, why don't as many salmon go between these two nets as will between the next two?

Q. How do the fish go up the river, in a line like geese, or do they spread out and cover the river generally?

A. When salmon strike the shallow water they spread, either ebb or flood tide, and when they strike the holes there is where they congregate; and the next change of the tide, whether half or full tide,

(Testimony of Ralph Grable.)

high water they spread to one hole and another, and begin coming in a bunch to the next hole. You can watch them from North Head to Pt. Ellice. The fish act just exactly the same in all these holes.

Q. How is it at the Sand Island location, do they spread out over the river generally? [464]

A. I think the salmon come from the hole, what they call the Black Tank Hole, to the "Republic" hole, and the next start they make is on the Sand Island sand, and the next time they leave there you don't know where they go, but the first thing you know they are at the Desdemona Sands. There is the next place you find the salmon; nobody knows where they have gone to, but the next place, why, they are right there.

Q. Are they scattered over this territory covered by these locations of the defendants?

A. They certainly are, when they go over that ground, when the seine is dragged over the ground, they catch the fish.

Q. Then it does follow that for that reason one set net will catch as many fish as another?

A. I think so.

Q. One will not be in the track of the fish?

A. One will not be in the track of the fish any more than the other.

Q. I understood you to say to Mr. Fulton that one set net, in your opinion, should catch as much as ten tons of fish per season. Did you have reference to the particular location there at Sand Island, or were you speaking generally on an average for the

(Testimony of Ralph Grable.)

lower river? A. I said a gill net, not a set net.

Q. I misunderstood you. What is the fact, Mr. Grable, as to other fishermen, whether gill netters or drag seiners, or those who fish with any appliance, respecting the location of set net fishermen?

A. Why, they respect the distances; they give what you call each man a show.

Q. By that you mean a sufficient distance for the clear and free operations of his location?

A. Of his gear and location.

Q. So as not to interfere with each other? [465]

A. So as not to interfere with each other.

Q. If the gill nets should drift down over these grounds, what is the custom as to the gill netters if there were set nets upon these grounds; would they drift down on them, or not?

A. They would clear or take up their net before they got there. That is what I would do.

Q. If the set netter has a right to be there, gill netters would respect that right and keep out of the road?

A. Yes, the gill netters is right to respect his right.

Recross-examination.

(By Mr. FULTON.)

Q. That is, if the gill netter thought he had a right to be there?

A. Any man is supposed to be a law abiding citizen.

Q. Yes, but don't you remember a few years ago when a gentleman built a trap south of Sand Island?

A. I was there.

(Testimony of Ralph Grable.)

Q. Were you among the gentlemen who pulled it out? A. I certainly was.

Q. The gentleman who built the trap on the south side of Sand Island had a license, didn't he?

A. We didn't pay any attention to that; he was on our ground.

Q. He was interfering with the main drift currents of your gill nets, wasn't he?

A. Not so much with gill nets as he was with the traps.

Q. Who? A. The man that drove the location.

Q. The trap-men didn't pull out this trap?

A. They certainly did not.

Q. Wasn't it the gill netters that did it?

A. Not on your tintype, the trap-men did. I was there, they done half and half.

Q. There was some gill netters mixed up in it? [466]

A. Yes, there were some gill netters mixed in it.

Q. Why?

A. They thought it was interfering with their drift. They didn't catch fish enough on that ground that season, enough to pay for the hanging twine on their nets.

Q. What trap do you refer to being pulled out?

Mr. WELSH.—Objected to as immaterial.

A. I don't know—

Mr. FULTON.—Q. Who drove it, do you know?

A. I don't know who drove it; I know whose driver drove it.

Q. Whose driver?

(Testimony of Ralph Grable.)

Mr. WELSH.—I object to that as immaterial.

A. As if anything—

Mr. WELSH.—This is bringing into the case something not in issue at all, and for the purpose of driving a prejudice, and wholly and entirely immaterial, and besides beyond the issues.

Mr. FULTON.—Q. You know by general reputation who the owner of the trap was.

Mr. WELSH.—I object to that as immaterial, and for the same reason as the other objection.

A. I know that one of the men is dead now.

Q. Do you know by general reputation who the owner of the trap was? A. I do.

Q. Who?

A. I think there were three different parties concerned in the proposition.

Q. Name them.

A. Dan Linn and James Franey, that is the only two names I know.

Q. Where was this trap built?

A. There was never any trap built there, it was only the location.

Q. The pilings were driven—where?

A. In the west side of Sand Island. [467]

Q. I am talking about the one driven up on the south side of the island.

A. I don't know anything about that.

Q. You don't remember about that one?

A. No, sir, I don't remember about it.

Q. You do not remember about the gill netters going down there in a body and tearing out the trap

(Testimony of Ralph Grable.)

driven on the south shore?

A. I don't know anything about that; that was before my fishing in that vicinity.

Q. There was one driven there in the Oklahoma Channel?

A. There was no whole trap driven there.

Q. I am talking about the piling.

A. I told you Dan Linn and James Franey. The trappers pulled them out, and I happened to be one of the trappers that pulled them out.

Q. Because you thought it interfered with your rights? A. Yes, sir.

Q. You did not respect their rights?

A. We did not think they had no right.

Q. You respect a man's rights when you know absolutely he has rights? A. Certainly.

Q. But if he hasn't any rights, you do not respect them? You do not pay any attention to what the courts say, you go and do it?

A. Fishermen respect one another's rights; if he has rights they respect it, and if he has no rights they don't respect it.

Q. They are the judge of whether he has rights; they are the judge and jury?

A. They are generally right, aren't they?

Q. Now, I asked you the question direct about whether or not you knew any person operating a set net during the entire fishing season—you understand that I mean during that portion of the spring salmon fishing when they generally operate them—they [468] don't any begin so early?

(Testimony of Ralph Grable.)

A. I don't know when—

Q. You understand what I mean?

A. I cannot recall to memory anyone who makes a practice of set netting out of season.

Q. They generally operate simply during the winter months?

A. Yes, catch winter fish.

Redirect Examination.

(Interrogated by Mr. HADLEY.)

When the Court has determined the location to be a valid location and has held that the locator is entitled to occupy it, it is the custom of the fishermen not to interfere with the Court, that I know of, and without regard to the law, or what the Court may hold, the fishermen are in the habit of respecting each other's locations, and do not interfere with them. [469]

[Testimony of Moses Hirschy, for Defendants.]

MOSES HIRSCHY, a witness called on behalf of the defendants, after being first duly sworn, testified upon interrogatories propounded to him by counsel for the defendants as follows to, wit:

(Interrogated by Mr. WELSH.)

My name is Moses Hirschy and I reside at Chinook, Washington, and have lived there going on twelve years. I follow the occupation of fishing; I have been engaged in the fishing business since 1903, during which time I have fished in the waters of the Columbia River, and that is the only place I have ever fished. The gear that I have used during that

(Testimony of Moses Hirschy.)

time was seining and dragging. I am acquainted with the operations of the Columbia River Packers' Association south of Sand Island in front of locations two and three. I worked there four years, working for them during that time doing all kinds of work, also fishing. I was working for the Columbia River Packers' Association in its fishing operations during that time on the south side of Sand Island in front of locations two and three fishing for salmon fish. I started in working for them in 1903 and worked nine years altogether. I fished for the plaintiff in 1908, 1909 and 1910 and 1911; I think it was 1912, 1911, 1910 and 1909, and I am working for the plaintiff now. I am not working for the plaintiff just at the present time. I saw the set nets of the defendants in the waters of the Columbia River; that was in 1909; I was fishing for the Columbia River Packers' Association at the time.

Q. In 1911 do you know how many tons of salmon fish were caught by the plaintiff in the waters of the Columbia River on the south side of Sand Island in front of locations two and three? [470]

To this question counsel for plaintiff objected upon the ground that it was incompetent.

A. I could not tell just exactly how many tons in 1911, something like 150 tons.

Q. I thought you told me 360 tons?

A. This is this year, 1912; 1911 would be last year.

Q. That would be 360 tons you caught?

A. Yes, sir, last year, 1911, we caught 360 tons. I know this because I would inquire daily as to the

(Testimony of Moses Hirschy.)

catch and saw them weighed. I know that this location on the south side of Sand Island was a good fishing ground, by that I mean a good place to fish, for the reason that fish certainly run there at all tides in very large quantities. They claim it is the best ground on the Columbia River for salmon fishing; that is so far as I know. I have fished for nine years and I think I ought to know something about it. I never tried any other kind of gear than the drag seines, but there was a set net license over there but I never saw much gear on it to amount to anything. I saw a lot of short pieces of gear on it at one time; that was in 1908. They were taken up by the Columbia River Packers' Association. We had to clear the ground if we wanted to fish, we have got to get the ground cleared.

South of Sand Island there are eddies in the river. It forms an eddy there when there are strong tides. I never set nets any over there but it must be such a thing that it was a good place to put set nets by fishermen. I guess a man could make something fishing on good tides. My judgment is that it would be a good place for set nets, but I would not like to give my opinion about that because I never tried it. I do not know of any better fishing location on the Columbia River than in the waters south of Sand [471] Island, and I don't know of any other place where the fish ascend in greater quantities than at that place.

Q. What can you say with reference to whether or not a set net, if placed south of Sand Island, below

(Testimony of Moses Hirschy.)

the line of extreme low tide, say, in about one fathom of water, and the set net was never more than about 100 fathoms out, as to whether or not that set net would be in the channel or course of the Columbia River used by drift net fishermen?

A. I don't think it would be right in the channel, because the channel is quite a ways out. How long did you say the length was?

Q. One hundred fathoms, say; is it not a fact that the drift net fishermen go south of Sand Island a distance of more than 100 fathoms? A. Yes, sir.

Q. And that the usual course and the general course used by them is more than 100 fathoms south of Sand Island? A. Yes, sir.

Q. Do you know how the fish run in the Columbia River at that point in 1910 as compared with 1911?

A. It looks to me it is about the same.

Q. About the same. What can you say relative to 1909?

A. I don't think it was just quite as good in 1909 as it was in 1911, but they ride through always, get their catches; some years you get more fish and some years less fish.

Q. Well, what can you say about 1908?

A. Well, it depends a whole lot on the water, and on the freshet. That is about all I know about it.

(Witness continuing:)

In using a drag seine horses haul it ashore; the horse goes on the shore. Sometimes you are in the water and sometimes on the land. It is not necessary that you should go on [472] shore to land the

(Testimony of Moses Hirschy.)

seine, it could be landed in the water, and the horse will be in the water. If you want to land in the water the horses and everything would be in the water; the water would have to be shallow enough for that. It is a fact that drift nets come ashore there and they come right close to the shore; in fact hundreds of them come close to the shore in a day. If you put a set net in there it would catch these gill nets sometimes. The set nets placed by Mr. McGowan were from ten or twelve feet from the shore, although I could not say exactly; some of them you could reach with a team, and some of them you could not reach with a team. In some places the water was so deep you could not go out and get them. They were probably three to two fathoms from the shore, something like that. At high water they might be five or six hundred feet from the shore. These hundreds of gill netters that I spoke of as drifting close in to the shore, they would generally come down there and wait until the flood came and go up with the flood, drifting up, and go down with the flood. They strike the shore all of the time when it is good fishing. Some of them strike the shore, and some don't, of course. They come along there about half tide. It is a frequent occurrence, in fact a daily occurrence, during the height of the fishing season that in operating seines we have to wait until the gill nets get by.

These set net locations that Mr. McGowan placed there, it seemed the gill netters were afraid of them; they were there quite awhile. Some of them, I think, were taken out by the gill netters, maybe one or two.

(Testimony of Moses Hirschy.)

I saw some of them hung up on them. If these set nets were placed there the gill netters would not have to abandon the river altogether, but it would injure their drift some. I don't know very much about it; in fact I never took much interest in the gill netters—always had lots of other work. Most of the gill netters seem to keep outside of [473] of the "Republic" there. Inside of the "Republic" there was not enough room for gill netters to drift so they kept out pretty well off the buoys. I don't know whether these buoys extended out over a mile from the "Republic"; I know the line of the current, but I could not say; it might be such a thing as a mile. The gill netters were there but I know nothing about the gill netting business. I seen them drift up and down there. The number that would drift up there I could not tell; they drift down and went down, that is all I would say. I would not say whether there were several hundred or not. I never counted them and I could not give you the exact number. The gill netters did not come in very close to shore because they would not drift in; it is a kind of an eddy and they did not like to come in; there is a kind of an eddy sometimes; that eddy shifts back and forth; it shifts as the tide shifts. I don't know how wide you call these eddies; you might call them ten feet, but I would call them, some of them 150 fathoms; I would call the eddies about that width; the bigger the tides, the bigger the eddies. At low tide from the edge of the shore line these eddies might be about 500 feet from shore. I would not swear to that, but as quick as the tide starts

(Testimony of Moses Hirschy.)

to flood it comes in close, something like a hundred feet. There is a kind of a cove in there and it seems that when the tide comes in, just as I told you awhile ago, it goes with the tide; maybe in half an hour there will be a strong eddy and all at once, no eddy at all, just quiet and a straight current. What I think about this eddy is, when the tide is running out, it starts at a point way down close to the "Republic," strikes that point and the water is away out, and the water running so strong it throws more water back, kind of throws the water back to the seine. After we lay out the seine, the seine runs just the other way. There isn't any swirl, it is just a [474] little quiet water; sometimes it is not very quiet; sometimes we don't have much eddy. If you set a net out there I don't think the tide would draw the fish out of it, I don't think the tide is that strong. I never operated a set net or a gill net; I don't know anything about them. I never set net in my life; all the fishing I have done I have seined. I know as far as seining on Sand Island is concerned it is valuable for seining purposes, but I do not know anything about set nets. I never saw Mr. McGowan take any fish out of his set nets.

Thereupon, plaintiff through its attorney moved the Court to strike out all the testimony of this witness pertaining to set nets upon the ground that the witness was incompetent. The counsel for the defendants objected to the allowance of said motion upon the ground that all the testimony brought out about set nets was brought out by counsel for plaintiff and

(Testimony of Moses Hirschy.)

The witness was not put upon the stand for that purpose.

Redirect Examination.

(Interrogated by Mr. WELSH.)

I do not pretend to know anything about running set nets. I do not know anything about the operation of set nets, but I saw the set nets of the defendants when located there. The inner line or buoy on these set nets was in, I should say, just about six fathoms of water.

Q. You mean to say the inner one was out in the water six times six, or thirty-six feet below extreme low tide?

A. There was deeper water, I won't go in there. Three times six is thirty-six.

Q. How long are these set nets? [475]

A. Our seines?

Q. The set nets of the defendants that you saw located there.

Q. Well, they were the regular—a piece of cable or a little piece of lead line.

Q. I asked you the length of them.

A. The length of the set nets?

Q. Yes, the length.

A. I never saw any *link*.

Q. You do not know how far they extended out into the water from the shore? A. No, I don't.

Q. You haven't any idea? Now, isn't it a fact that beyond them is the place where gill netters drift, and not inside? A. Yes, they reach mostly outside.

Q. Isn't the channel of the Columbia River mostly

(Testimony of Moses Hirschy.)

outside? A. Yes, sir.

Mr. FULTON.—That is leading and suggestive.

Mr. WELSH.—I think the Court would permit me to lead this witness.

Q. Where is the channel of the Columbia River, Mr. Hirschy, with reference to where the set nets of the defendants were located? A. The channel?

Q. Yes. A. The channel is quite a ways out.

Q. Out where? A. Out into the river.

Q. South of where they were? A. Yes, sir.

Q. South of the extreme end of it? A. Yes, sir.

Q. How far south of the extreme end of this set net? [476] A. How far is south?

Q. How many hundred feet south of it?

A. Well, sir, the channel is pretty well over.

Q. Isn't it a quarter of a mile?

A. It looks that way.

Q. Or more? A. Or more.

Q. Isn't it a fact that the gill netters very seldom, if ever, come into the place where set nets are located?

Mr. FULTON.—I object to counsel cross-examining his own witness; it is leading and suggestive.

A. Just as I said before; yes, they drift outside, most of them.

Q. (Last question read.) Do you understand the question?

A. Yes. Do I have to answer that question?

Q. Yes, they very seldom if ever come in?

A. Very seldom.

Q. How did you answer?

(Testimony of Moses Hirschy.)

A. I said very seldom, they come in.

Q. Very seldom they come in. Mr. Fulton would have you testify that they used to come in and get hung up on our buoys, is that a fact?

A. Well, of course, here and there one gets tangled up, what I saw.

Q. How often did you see it?

A. Not very often, because they don't come in there.

Q. Why don't they come in there?

A. It seems as though that eddy drives them out; such a thing must be.

Q. Now, in answer to counsel's question, he made you testify as though that eddy would disappear at times and there wasn't anything to it. Is that a fact, or is the eddy permanent there? [477]

A. You know how it is, it will be there for half an hour, and then kind of disappear—

Q. But at such stages—

Mr. FULTON.—Let him alone. Go on and explain.

A. The stronger the current the heavier the eddy, and the less the current the less the eddy.

Mr. WELSH.—Q. But that is true every day?

A. Yes, sir.

Q. It doesn't disappear to-day and come back to-morrow, but is always the same? A. Every day.

Mr. FULTON.—I object to counsel cross-examining him; leading and suggestive.

Mr. WELSH.—Q. The same tide?

A. Yes, sir.

(Testimony of Moses Hirschy.)

Q. Now, this eddy,—is it or is it not practically in the locations where we had our set nets?

A. Yes, sir.

Mr. FULTON.—I object to that as leading and suggestive. (Last question read.) That is a leading question.

Mr. WELSH.—Q. I want you to tell me this, Mr. Hirschy; tell me whether or not our locations, our set nets, were in the eddy or were not in the eddy.

A. They were in the eddies of course.

Q. Is that what you meant a moment ago when you said yes to my question?

A. I thought I answered your question, yes, sir.

Q. That is what you meant? A. Yes, sir.

Q. Did you mean to say our set nets were in the eddy? A. Yes, sir. [478]

(Witness continuing:)

These grounds are good fishing grounds and I think the best grounds on the Columbia River and is a good seining ground.

Recross-examination.

(Interrogated by Mr. G. C. FULTON.)

Q. Now, Mr. Hirschy, I think you told me that the inside buoy to the set nets of Mr. McGowan were about eight or ten feet from the shore at extreme low tide, did you not?

A. There might be such a thing; I said 30 feet.

Q. You testified a while ago—

A. At extreme low water.

Q. Yes. Then you testified awhile ago that this

(Testimony of Moses Hirschy.)

eddy you spoke of was 150 fathoms from shore at extreme low tide.

A. No, I said 150 fathoms in width.

Q. You said it was 500 feet from the shore at extreme low tide? A. Yes, sir.

Q. Five hundred feet from the shore at extreme low tide? A. Yes, sir.

Q. If the inside buoy was only 30 feet from the shore at extreme low tide and only out 100 feet, that would make it 150 feet—you would still be 150 feet inside of the eddy?

A. That is what I said, something like that.

Q. Mr. McGowan's set net would still be 150 feet inside of where the eddy was?

A. The eddy is wider at one end than it is at the other.

Q. You said it was about 500 feet from the shore at extreme low tide; that is what you told me.

A. That is the way it forms; that is the way the eddy forms.

Q. And the inside buoy of Mr. McGowan's set nets was 30 feet from the shore?

A. At low water. [479]

Q. I am talking about low water all the time. Then, if his net is only 100 fathoms, he would not get any part of the eddy at all, would he?

A. I never told you the net was 100 fathoms long, I never mentioned the length of any, long.

Q. Was it 100 feet in?

A. I never said the length—I never saw anything but a little piece of wood on it.

(Testimony of Moses Hirschy.)

Q. It did not reach anywheres near the eddy?

A. If you put it in the eddy it will reach.

Q. Where it was anchored it did not reach there by 500 feet, did it?

A. I don't know nothing about the net proposition, because I never saw one there.

Q. You do not know whether it was off the eddy or in the eddy? A. I know it was in the eddy.

Q. It was 500 feet from the shore, wasn't it?

A. At high water—at low water, medium water, I said 600 feet, medium low water.

Q. How far is it from shore at ordinary high water? A. I should judge, I don't know—

Q. It would be over 1000 feet at high water?

A. I don't want to say exactly; I should judge, my estimation.

Q. If it is 600 feet from shore at low water it must be about 1,200 feet from shore at high water, wouldn't it? In other words, the net would not move out any further, would it; the net would sit stationary?

A. If you put it stationary.

Q. It was put stationary, wasn't it?

A. I never saw no net to amount to anything.

Q. I don't know what you mean by location.

A. I said, net location. [480]

Q. What do you call set net location?

A. The set net, what they call set net location, here, and one here, and one there, and one, and so forth (witness indicating table).

Q. What do you mean by set net location?

(Testimony of Moses Hirschy.)

A. I guess I am the one that don't understand.

Q. I think it is my fault; what do you mean by set net location?

A. In fact, I don't know much about these locations.

Q. You just wanted to please Mr. Welsh, and wanted to tell him this was as near the eddy as you could?

A. I just said the eddy and his location were in that eddy.

Q. Tell us what you mean by location.

A. Set net location—

Q. Are the buoys anywhere near it, either of the buoys? A. You call them buoys, this location?

Q. Yes. A. Well, that is different.

Q. Were these buoys anywhere near it?

A. They were right in the eddy.

Q. Then, they were over 600 feet from the shore at low tide, according to your figures.

A. Explain that again.

Q. I understood you to say that this eddy was 600 feet from the shore at low tide.

A. I said it, yes, as near as I can.

Q. Then you said that the buoy Mr. McGowan put out there was in the eddy. A. That is what I said.

Q. That would make the buoy over 600 feet from the shore?

A. Yes, at low water, considerably less at high water.

Q. His outside buoy would be over 600 feet—would

(Testimony of Moses Hirschy.)

be at least 600 feet from the shore at low water, is that correct? [481]

A. I know that them buoys was in the eddy and they were out 600 feet, by my judging, out in the eddy from high-water mark.

Q. From high-water mark, I see. At low-water mark they would not be in the eddy?

A. They would be in the eddy just the same.

Q. At low water.

A. Yes, sir. I can take you and set you in a place and you stand there, and you have to get out of there pretty darned quick. I can set you in another place and you can set there all day and the tide would not drive you out.

Q. I understood you to say that this eddy shifted with the tide? A. I said that, yes, sir.

Q. Which buoy was out in the eddy, the inside buoy?

A. I just seen one buoy, I never seen two buoys. You mean two buoys on one, yes.

Q. This buoy 30 feet from the shore was the one in the eddy? A. Yes, sir.

Q. That is perfectly clear. That is satisfactory.

Witness excused and hearing continued to April 24, 1912. [482]

April 24, 1912.

Parties met pursuant to adjournment at 9:30 o'clock, A. M.

[Testimony of H. S. McGowan, for Defendants.]

H. S. McGOWAN, a witness on behalf of the defendants, after being first duly sworn on oath, testi-

(Testimony of H. S. McGowan.)

fied in response to interrogatories propounded to him by counsel for defendants, as follows:

My name is H. S. McGowan; I am one of the defendants in this action; my occupation is canning salmon and fishing. I have had experience in fishing on the Columbia River ever since 1879 or '80, and have been since that time continuously engaged in the operation of fishing gear for the purpose of catching salmon fish. I am president of P. J. McGowan & Sons, a corporation; that corporation is engaged in canning and packing salmon and carrying on fishing operations on the Columbia River in Oregon and in Washington. I have had experience in the operation of set nets, drag nets, and other gear, in fact with every sort of gear that has legally operated on the Columbia River so far as I know. My earliest experience was with drag seines and pound nets and trap fishing.

Q. Are you acquainted with Sand Island?

A. Well, I am acquainted with second Sand Island. I presume you mean the one near the mouth of the Columbia River.

Q. Yes, sir. A. Yes, sir.

(Witness continuing:)

I am acquainted with Sites numbered Two and Three on this island. I operated fishing gear in front of Sites Two and Three for salmon fish prior to the location of the set nets involved in this suit. The last drag seine I operated there was up to and including the season of 1907. When we first used [483] these grounds and fishery it was along

(Testimony of H. S. McGowan.)

about 1893 or '94. I could not tell you exactly the year, but that was with pound nets or traps. The conditions were very much different then than they became later on. Afterward the pound nets were discontinued. A man by the name of Brumbach at Ilwaco utilized the portion of the territory for drag seine fishing, and our company bought those fishing rights, and his outfit as well, from him, in the year 1902, if my memory is correct, along about there, and we operated it continuously as a drag seine fishery from then until and including the year 1907. In the meantime we had purchased some other fishery rights and fishing outfits from another party that had a part real and part claimed right over a portion of that same territory, and in order to clear up the entire matter and get the fisheries in condition we thought we could get the best results out of them, we bought the other party out as well as a man by the name of Reischman. That portion of the Columbia River south of Sand Island is the most favorable portion of the entire river so far as I know for salmon fish. I know this from actual experience there, and I know they congregate there in large quantities.

I am also acquainted with other parts of the Columbia River from the lower Cascades down to the mouth, and I consider the south side of Sand Island and in front of Sites Two and Three as the best location on the river for fishing purposes. I have heard more or less fishermen express their opinion and they are all of the same opinion, that is, that it is the best fishery in the river for salmon. That is during the spring

(Testimony of H. S. McGowan.)

season, I am not speaking of the winter, and it has the general reputation among fishermen and those engaged in salmon fishing, to be the best location on the river. The southern shore of Sand Island is, I should say, a little less than three miles long; it may be fully three miles long. Of course, with the underlying sands, I suppose, that lay out below it, it is more than maybe four or five miles long, but the portion [484] that comes bare at low tide on the southerly shore is perhaps three miles in length, and it describes not exactly a crescent, but very nearly, a portion of the crescent in general outline, with a number of indentations. At the easterly end of the island the waters from behind, or from Bakers Bay, properly speaking, move out past the end of the island, as they come in contact. Those waters come in contact on the ebb tide with the westerly current setting down on what is called the north channel of the Columbia River, and those currents meet at approximately right angles, with the result that the north channel—the northerly edge of the north channel—is pushed in shore to the southern, and it creates to a considerable extent, where those waters become merged, a sort of a whirling motion of the water, including eddies, not one but millions—various small eddies merged in one large eddy, which at periods of the tides is very wide and extends quite a way out in the river, sometimes it don't extend nearly so far out in the river, but that has a controlling influence on the flow of the water down there and alongside the entire south shore of the island, and at any rate the

(Testimony of H. S. McGowan.)

result of the water's actions and the current's actions has caused the island to take, on the south shore, the form of a crescent, with numerous indentations, and occasionally little points extending slightly out into the bend of the crescent, and these little bays extend back further into the crescent with quite a pronounced turn, deeper and larger just inside, and easterly of what is known as the great "Republic" wreck. The general result is that the main channel of the river takes more or less to a straight line to the outside of this bend, created by the crescent in the island, and these indentations, and the eddy, generally speaking, occupies that space between this channel line or main current line and the shore of the island, and there are many variations, of course, in the action of the water at different places and different tides, and different stages [485] of the tide, in that area, but in general it constitutes an area of eddies as distinguished from a general current or channel. These eddies extend out at various distances at different times of the tides—on different tides and at different places, I have seen eddies at times when the current of the river had slacked and the main channels of the waters were beginning to get quiet, just before the low-water slack, and before the flood began, when the current would be comparatively even, over the entire area, there would be very little current in the channel and there would be very little current elsewhere, because generally speaking the action and the size and the strength of an eddy depends very largely on the strength of the

(Testimony of H. S. McGowan.)

channel movement. When there is a very powerful strong channel movement there is apt to be a correspondingly strong eddy movement on the inside, and they may throw a portion of it in a contrary direction with the channel movement; part of it may be in the same direction or at an angle from that, or merely variations.

I have seen these eddies extend out from the southerly shore at times as far as 1500 feet. I have seen it at other times when it was just about the time of slack water, there at low tide, or at high tide, there was absolutely no difference in the water anywhere so far as its movement was concerned. I should say that this eddy extends over 100 fathoms. I have seen it extend out at least 1500 feet in places, and have seen that eddy where it required the biggest part of 300 fathoms of net to go out past it. This eddy extends in front of said sites numbered two and three. The main channel of the Columbia River is further south than this eddy. The location of this channel with reference to such eddy depends upon circumstances. The channel, as I understand the channel of the river, would mean the usable, practicable, channel for such traffic as pass there,—vessels. While the greatest depth of water in the basin of that river between [486] there and the jetty and the cross-section across the river is perhaps eighty feet, I should consider the channel would not really gain until it had gone out over four or five hundred fathoms of water, because the vessels that ply there draw, many of them, over 20 feet of water, and it requires

(Testimony of H. S. McGowan.)

some water under their bottom for safety. I would consider the channel begins somewhere around the four fathom line.

I am in a measure acquainted with the place in the Columbia River where fishermen are fishing for salmon fish, drifting back and forth with their drift nets. A gill net fisherman is apt to drift any old place where he thinks he can catch fish, but as to the matter of a man drifting in that portion of the river, the main and principal drift is in the north channel, right next to this eddy at Sand Island. The great bulk of the fishermen drift down through there. They let out their nets and the main or principal drift is along about half ebb tide; some will put out their nets before and some after, and they come from various places. Many of them will lay out their nets as high up as Pt. Ellice, which is about four to six or seven miles above there. Others will lay out near the Desdemona Sands opposite Sand Island; others will lay out in front of McGowan, two or three miles above there; others will lay out in the neighborhood of Desdemona Lighthouse, which is between the middle channel and south channel. And these people lay out their nets with the idea of drifting down to the lowest part of the ebb tide and meeting the coming back movement of the flood around in the neighborhood of the "Republic" wreck, either below there or above there, or around in that neighborhood out in the edge of the channel, and the result is that a great many nets congregate down in that neighborhood along about low water—because the first fishermen

(Testimony of H. S. McGowan.)

that reach that point—the first drift coming down, they strike the slackening current before the back up of the water in the tide [487] in the ocean, while the men further up stream will have the ebb tide to bring them down. The men congregate, and the nets become extremely thick; at times I have seen the nets so thick if you tried to cross within fifty feet length you may have two or three cork lines under your keel at the same time, they get that thick out about the “Republic” wreck, and extend from there nearly to the jetty sands on the other side of the river.

The main drift of the current in the river to this eddy which I spoke of, is to the south, as I have just explained. I was familiar with the locations of my set net location in front of said Sites Two and Three and with the location of the other defendants, and they were placed in the eddy which I have described. From my knowledge and experience as a fisherman the place where these set nets were located—I have reference to both my own and to those of the other defendants—was a practical place for the fishing of salmon fish with set nets in the Columbia River. Each of these set nets were outside of extreme low tide south of the island, and I should say maybe 400 or 500 feet apart.

Coyote is not a general or continuous method, it is a short intermittent method of catching little schools, and the fish are there at particular spots, and at particular times. It is indulged in by some fishermen at some places when they think it is favorable. They engage in that selecting a place where they think they

(Testimony of H. S. McGowan.)

might catch some fish from, for some reason or other, and a place is perhaps limited in area, or the physical conditions such that they cannot keep their net in the water for any considerable length of time, and they will take a position which they consider is the most favorable part of that area of the water, and they will lay out a portion of their nets, such portion as they think they can handle with the best result, and they will lay that out and drift, or lay in that particular locality as long as they see fit, or as long as they can keep it there [488] without running an unnecessary risk, and then they will take it up and if there happens to be a down current in that point and they have a good place to fish they go back where they came from and repeat the operation. They sometimes will throw a rock over to hold the net in position so that it won't drift so fast, or keep it from drifting at all, if the current is mild.

Now, with reference to the waters in front of Sites Two and Three, there are gill net fishermen that fish at times in there, and generally speaking a gill net fisherman will dump his net down any place and fish, if he thinks there are any fish there. The coyote method is used there. Occasionally a man will drift in there, or at least a portion of his net may drift in there, but the most general drift is on the river. They don't lay out here and another there and drift out in procession at all. It is generally a small portion of the net that comes in, or they may come in and lay their net out practically stationary. Of course it won't be absolutely stationary. They aim to do as

(Testimony of H. S. McGowan.)

little drifting as possible, because they cannot stay long if it really drifts. If they drift with the flood tide they will be carried out by the ebb tide and they will go on the spit or "Republic" wreck, one or the other.

Q. You being acquainted with the locations of the defendants in this suit, in the waters of the Columbia River, you may state and give us your opinion from your knowledge and experience, how many fish would have been caught by the defendants on these locations had they been permitted to fish them as compared with the number of fish caught by a drag seine.

To this question counsel for the plaintiff objected on the ground that it was incompetent and immaterial and does not come within the rule for the measure of damages in this case. [489]

A. There would be a large quantity of fish caught. Of course it would be impossible to state just how many, or just what percentage that might be taken in comparison with some other class of gear, but I believe the catch would compare favorably with the catch of other classes of gear, and I think it would compare favorably with the catch of the drag seines.

Q. Supposing these defendants had not been enjoined and restrained in this suit from operating set nets in the locations in question, give your opinion as to the amount of fish that would have been caught by them as compared with the number of fish that would be caught with a drag seine on this territory in those waters.

To this question counsel for plaintiff objected upon

(Testimony of H. S. McGowan.)

the ground that the same was incompetent and immaterial and does not come within the rule for the measure of damages in this case.

A. Well, they might not catch as many and again they might catch as many. Possibly if the drag seines were operated by a first-class, industrious man, that had had experience in the use of seines at that particular place, they might catch more than the nets could. On the other hand, if the seine was handled by a man who did not understand or was incompetent or negligent in the use of it, why, he might not get as many as the set nets would catch. But assuming that both were handled in the ordinary method, by men who understood their business, I think in that case the drag seine would probably catch more fish; but on the other hand, the set nets would catch a great many fish. [490]

Q. About how many more fish would the drag seine catch, if any?

To this question counsel for plaintiff objected upon the ground that it was incompetent and immaterial and does not come within the rule for the measure of damages.

A. I think set nets would catch two-thirds as many as the seines.

Q. Now, will you state the comparative cost of the operation of the drag seine as compared with the operation of the defendants' set nets, had they been permitted to operate them in these waters at that place?

To this question counsel for the plaintiff objected

(Testimony of H. S. McGowan.)

upon the ground that it was immaterial and that the witness has heretofore fully testified concerning this same question and that it has been gone over very fully.

A. To the question of operating the drag seines, of course it is greater than that of the set nets, and it would depend upon the length of time they were operated. If they were operated in the most favorable part of the season, why they probably could be operated at an expense of something like \$2,000. It would take some real experience to find out exactly as to that, because you might run against some conditions you did not know of beforehand. In its entirety that might vary the scope of your operations or some of your methods, possibly. I am giving my opinion. In regard to the comparative net results as to the operation of a drag seine there, of course that is difficult to state, but I think the results would compare favorably. The drag seine would cost more to operate and perhaps catch more fish, but the set nets would cost less to operate and might catch less fish, but the [491] proportion of gain would be larger in the cost of the set net; ought to be.

Q. Assuming that the drag seine which is operated by the plaintiff on this ground or in the waters where the defendant would have operated their set nets, caught in 1911, 360 tons, or practically that, of salmon fish—

To this question counsel for plaintiff objected upon the ground that the testimony in this case shows plaintiff's seines were operated in front of Sites One,

(Testimony of H. S. McGowan.)

Two and Three in 1911.

A. I would say these nets ought to get two-thirds as much fish, or thereabouts. It is largely a matter of opinion. It would depend of course on the skill and experience with which the gear was operated. The fish are in there, there is no question about that, merely a case of knowledge and skill and force, with which the business is carried on. Where the defendants had their set nets there were more fish to be caught there than any known place on the Columbia River. There is where they congregate and make their first movement upstream and you get the first shot at them. It is a good deal like shooting into a flock of ducks, you get the solid bunch, you get the best of it.

(Witness continuing:)

The price of salmon for the year 1911 was six cents per pound for salmon under twenty-five pounds, and above that salmon for cold storage purposes was seven and a half cents per pound, and the price of steelheads varied all the way from six cents to eight cents, according to circumstances and locality. And these prices were maintained by canneries and cold storage plants until about the middle of August. At that time the price on the river [492] came to what was called a flat price of six cents for all kinds of salmon, regardless of weight.

My recollection of the prices in 1910 were that they were five and a half cents for what is known as cannery salmon, and seven and a half cents for cold storage salmon; that is my recollection. The

(Testimony of H. S. McGowan.)

prices have been changing to some extent on some varieties nearly every year, and I am speaking from memory only.

The price of cannery salmon in 1908 was five cents per pound, I believe, either five or five and a half, and cold storage was, I think, seven cents per pound.

The price of salmon in 1909 was five and a half cents for cannery salmon and seven cents for cold storage.

Q. Now you may give us the comparative quantities of the run of fish in the Columbia River for the years 1908, 1909 and 1910 as compared with 1911.

A. Well, that is a little difficult to give for this reason: One portion of the river may have a better run this year than any other portion, and yet the aggregate catch on the entire river may be larger during the year, when this particular portion had a smaller run. For instance, you take it in the year 1911 and the catch of salmon on the upper—middle and upper Columbia River, was less than it was in 1910, but the aggregate catch of the entire river was larger than it was in 1910; I would suppose fifteen per cent greater. The run in 1909 was somewhat less than 1910 and 1910 was somewhat less than 1911. I am speaking of the aggregate of the entire river, not of any particular point on the river. We don't compare any particular branch of the river because one branch on a smaller season may do better in fish than the same branch does on a good, big season. In 1908 the run was a little better than it was in 1909, if my memory serves me right. By run, I mean the

(Testimony of H. S. McGowan.)

number of salmon fish caught in the river that year.
[493]

Q. What I am trying to establish is about what the average run of salmon would be at the place where your set nets were located, the aggregate run. Can we determine that by the aggregate run of the fish for the various years?

To this question counsel for the plaintiff objected upon the ground that it was immaterial.

A. Well, there would be an average, of course, taking a considerable series of years, but one season taken with another varies. Some season will vary not more than five or ten per cent, but other seasons may vary from fifteen or twenty or twenty-five, one season with another.

Q. How do you determine whether a location is a good location for the fishing of salmon fish?

A. It is determined primarily on the catch that is capable of being taken there, and in its relation to the cost of getting them, and in taking the aggregate catch of the locality, and the expense bill for catching them, I determine what profit can be made out of it, and of course that fixes the method of getting at the value of the fishery. But there would be no way that you could get the average. You could, of course, estimate, but your estimate might be below and it might be above.

Q. If I go to you to sell you a fishing location and I would give you the number of fish that I caught for a certain year or season and tell you the kind of gear I used to catch the fish, how would you deter-

(Testimony of H. S. McGowan.)

mine its value, or how would you determine as to whether or not it had any value for fishing purposes?
[494]

To this question counsel for the plaintiff objected upon the ground that it was incompetent and immaterial and not a subject for expert testimony or opinion; it was a matter of common sense.

A. Of course, I would know from experience if I was familiar with the details of the business—that branch of the business—I would know about what the cost accounts were in conducting that business and know in a general way, possibly not absolutely accurately, but in a general way, in lump sums, about what this output of fish was, and I would know in a general way what the value of that fishery was.

Q. Assuming that in the waters of the Columbia River where the defendants had their set nets, and being the place from which they were excluded by the plaintiff in this suit, now, assuming that the plaintiff caught 360 tons of salmon fish with a drag seine, for the year 1911, you may from your knowledge and experience as a fisherman state whether or not that is a good or bad location for fishing purposes.

To this question counsel for the plaintiff objected upon the ground that it was incompetent, irrelevant and immaterial.

A. I would say it is a good one. It is a better locality than any other place on the river.

Q. Now, have you had any experience with reference to the leasing or the renting of fishing locations?

(Testimony of H. S. McGowan.)

A. I have, and gear as well.

Q. Do you know the annual rental value of a fishing location? A. Yes, in a general way. [495]

Q. Do you know the value of the use and occupation of a fishing location for a year?

A. I don't quite catch the question.

Q. Do you know the value of the use and occupation of a fishing location for a year?

A. Yes, generally speaking I do. Of course, that depends a good deal on having pretty accurate knowledge of what the location is that is in question.

Q. Now, will you state what it is?

A. The general rule—

Mr. FULTON.—I object; it is incompetent, immaterial, and irrelevant; not responsive to any issue.

A. The general rule is to this effect, that any good, standard fishery—I am not talking about any bum fishery, I am talking about a good, standard fishery—that one-third of the gross catch goes to the owner of the fishery providing that the man that leases from him and operates it furnishes everything, but if the man that owns the fishery rights, furnishes the outfit and gear and all that, and the other fellow carries it on, there is a square division of half and half—each man takes half of the gross catch.

Q. Do you know the market value of this leasehold or rental?

Mr. FULTON.—That is objected to as incompetent; the witness himself is incompetent.

A. Well, the market value is according to the rule

(Testimony of H. S. McGowan.)

I have just told you, would be one-third of the gross catch.

Q. One-third of the gross catch of fish?

A. Yes, sir, that is, to lease it—market value of the lease.

Q. Would that rule apply to the location where these defendants had their set nets in the waters of the Columbia River? A. It would.

Mr. FULTON.—Same objection. [496]

A. That is a good place to apply it. Ordinarily a fishery as good as that, so much better than the average, a man that wanted to lease it would get more than one-third of the gross catch in order to get the privilege of fishing, but that is above the average, you understand, because it is a high-grade fishery.

Q. This particular location? A. Yes, sir.

Q. Assuming that the plaintiff, with the use of a drag seine, caught 360 tons of salmon fish in the waters of the Columbia River, at the place where the defendants had their set nets, and where they would have been operated had they not been enjoined, you may state what the market value for the use and occupation of that fishery right would have been for the year 1911.

Mr. FULTON.—I object to that as incompetent, also upon the further ground that the evidence shows the plaintiff in making this alleged and estimated catch, operated drag seines, and also operated Sites No. 1, 2 and 3.

Mr. WELSH.—Q. You may answer the question

(Testimony of H. S. McGowan.)

now. Assuming 360 tons were caught, you can figure the rental.

Mr. FULTON.—Same objection.

A. It would be one-third of the 360 tons; it would be 120 tons.

Q. All right. For all these set nets?

Mr. FULTON.—That would be how much a ton?

Mr. WELSH.—One hundred and twenty tons at six cents a pound.

Mr. FULTON.—It would be \$600.00 a ton?

The WITNESS.—No, the average selling price would be about \$130.00 a ton.

Mr. FULTON.—Q. It would be \$130.00 a ton?

A. Yes, sir; six cents for the cannery fish and seven and a half for the cold storage. [497]

Mr. WELSH.—Q. What would the fish average, would they average six and a half cents?

A. Why, I just said about \$130.00, the ton; that would be about six and a half cents. Usually the salmon will average up to about fifty per cent of the cold storage sizes and about fifty per cent cannery size, but during the last part of the season sometimes, as occurred in the case of last year, the cannery and cold storage prices merged, and in that case less than fifty per cent of the catch would be cold storage size and more than fifty per cent would be of the cannery size, so far as prices are concerned.

Q. The value of the fish, assuming your figures are correct, would be about \$15,600.00 for that year, that the set nets would have caught?

A. Yes, sir, about that.

(Testimony of H. S. McGowan.)

Q. It would cost about how much to operate these set nets?

Mr. FULTON.—I object to that; the witness testified that would be the actual rental value, one-third of the catch.

Mr. WELSH.—Yes, he did; that is right.

Q. What would be the annual rental value for the years 1908, 1909 and 1910 for which the defendants have been excluded?

Mr. FULTON.—Same objection.

A. It would be that portion of the gross catch, about one-third, whatever it might be.

Q. I want to show what it might be; would it be that much, more or less?

A. I haven't any means of knowing what it is.

Q. You have fished these grounds; you know the location, you know the catch of one year; you have operated fishing gear there. Now, give your opinion as to the rental value for the years 1908, 1909 and 1910. [498]

Mr. FULTON.—I object to that as incompetent.

A. Well, here is the only way I can get at that is in the common sense way. Now, you have asked me to assume there was 360 tons there in 1911.

Q. Yes.

A. 1911, 360 tons; now, my knowledge of the general conditions and what the fisheries did on the Columbia River at large, and what knowledge I have observed one way and another from that fishery and other fisheries, I would put it down this way, 1911, 360 tons; 1910, approximately 300 tons; 1909, ap-

(Testimony of H. S. McGowan.)

proximately 200 tons; and 1908 approximately 200 tons. Now, 1909 might be considered less than 200 and it might run down to 150, that is in relation to all those figures, starting with the first you gave me as 360.

Q. What is your opinion as to whether or not that would be correct?

Mr. FULTON.—I object to that as incompetent.

A. It would start on the basis of 360 tons, as you can.

(Witness continuing:)

We had eight set nets; I had two, defendant Lindstrom had three and defendant Coyle had three. I think my locations were somewhat better than the others. Generally speaking, the "Republic" wreck was—was generally considered as sort of a storm center, the character of the point for fishing, it is a kind of fishing center, the great "Republic" wreck. I mean all around it out in the channel, outside of it, and below it and above it. The purse seiners and gill netters and the likes fish there, and they anticipate good catches of fish there. Our locations were just inshore above, easterly from the wreck.

Q. Now, if the Court in this case should find any damage due to the defendants, in your judgment how should these damages be divided, whatever sum may be found, as between you three defendants? [499]

A. I think it would be fair to divide it equally between the defendants, or give them a proportion according to the number of nets they had in relation to the whole number. I think my two locations were

(Testimony of H. S. McGowan.)

as valuable as three of the other defendants. It would be satisfactory to me if the Court should find any damages due all of us to have an equal division made with the three defendants.

The defendants would have operated and used these waters for fishing purposes with their fishing gear had they not been excluded by the plaintiff, that is by injunction in this suit.

Q. Have you licenses now issued by the State of Oregon?

To this question counsel for the plaintiff objected upon the ground that it was incompetent.

Mr. WELSH.—I will send for them if you object on that ground.

Mr. FULTON.—It is absolutely immaterial—yes, I insist upon you sending for them outside of 1908, because you never had them.

Mr. WELSH.—I mean since—the Court has that part settled. I am not going into that phase of it. Here is the point: Since March 31, 1912, has the State of Oregon issued to you licenses for these locations?

Mr. FULTON.—I object to that as incompetent and immaterial, on the ground that the State of Oregon doesn't issue licenses for any locations, and furthermore that it is incompetent and not the best evidence. A. Yes, sir. [500]

Cross-examination.

(Interrogated by Mr. FULTON.)

Q. You have a license from the State of Oregon to operate your set nets in the year 1908?

(Testimony of H. S. McGowan.)

Mr. WELSH.—Objected to as being immaterial, for the reason that matter has been settled by the Court, and is *res adjudicata* so far as the plaintiff is concerned, and it is not in issue at this time.

A. You have reference to the trap or set net?

Q. Set nets in front of this ground.

A. For the year 1908?

Q. Yes. A. Yes, sir.

Q. Did you put up any Oregon license number?

Mr. WELSH.—I object to that as incompetent, irrelevant and immaterial, and for the further reason that matter has been settled by the Court and the Court has held and decided that the plaintiff unlawfully excluded the defendants from the fishing locations, and that the defendants had a prior and exclusive right to fish in these locations. And to all this class of testimony it is agreed that the defendants have made this same objection, and it will save repeating.

Mr. FULTON.—Sure, and every other objection the ingenuity of counsel might suggest.

A. I don't know that we did.

Q. Don't you know that you did not?

A. My impression is that we did not do it, but I would not be positive on that point.

Q. You are operating really under the Washington license?

A. We thought we were in Washington.

Q. You did not put up any—post any notice of the number of your Oregon license, neither did you

(Testimony of H. S. McGowan.)

stamp on your [501] corks the number of your license?

Mr. WELSH.—We object to the trial of the original action in this case.

Mr. FULTON.—I told you you could have any objections the ingenuity of counsel could suggest.

Mr. WELSH.—This is no place to try that.

Mr. FULTON.—You brought it out on direct examination.

(Last question read.)

A. I don't think that we did.

Q. Don't you know whether you did or did not?

A. I don't know that we did not.

Q. Will you swear that you did or did not?

A. No, I would not.

Q. Would you swear that you did?

A. No, I won't do that either.

Q. Don't you know anything about it?

A. No, I don't know whether we did or did not.

Q. Don't you know you did not?

A. No, I don't know that, sir; we may have and may not down there.

Q. Did you have an Oregon license to operate a set net in front of this site in 1909?

A. No, we did not take out any license for 1909 in front of that site, in Oregon, I mean.

Q. Did you or either of the defendants have issued to you for the years 1909, and 1910 any license from the State of Oregon—any license to operate set nets in front of Sites 2 and 3 of Sand Island?

(Testimony of H. S. McGowan.)

A. 1909 and 1910?

Q. Yes.

A. Not from the State of Oregon; we were enjoined at that time, you know. [502]

Q. Did either of the defendants, Coyle or Lindstrom, post any notice of the—any set net notice under the Oregon license for the year 1908, when you first appropriated these grounds?

Mr. WELSH.—The defendants object to all this class of testimony on the ground that it is entirely immaterial, nothing involved in this issue here, and that it is an attempt by counsel to try the original suit, which was decided by this Court.

A. That is the Oregon license you have reference to?

Q. Yes. A. I don't know that we did, sir.

Q. As a matter of fact, you thought you were operating under the statutes of the State of Washington?

Mr. WELSH.—Same objection, and for the reason all that testimony was brought out in the original suit.

Mr. FULTON.—I wish to withdraw my stipulation in which I stipulated counsel should be allowed to object to questions I ask. Counsel does not seem to want to be bound by his, and I do not care to be bound by mine. I will abide by the stipulation if you will. If you won't, I will not.

(Last question read.)

A. Well, we certainly did at the time we took out our locations originally and made them.

(Testimony of H. S. McGowan.)

Q. You had your Oregon license number on your cork lines—your Washington license number on your cork lines?

Mr. WELSH.—I object to that as incompetent, irrelevant and immaterial, and for the further reason the Court has decided and determined this question adverse to plaintiff, and the only thing we are to determine here is the damages to deal out to the defendants, if any.

A. I could not tell you that, I don't know. [503]

Q. Under the laws of Washington you were required to post a notice with the number of your license plainly printed on it for set net purposes, weren't you?

Mr. WELSH.—Same objection.

A. Same location?

Q. Did you not do that with these locations?

A. Yes, sir.

Mr. WELSH.—Same objection.

Q. Did the other defendants do that with their locations? A. Yes, sir.

Q. So, when you located your set nets in controversy here, you posted a Washington license in accordance with the laws of the State of Washington?

A. Yes, sir.

Mr. WELSH.—Same objection.

Q. But you do not know whether you did in regard to the Oregon license, or not?

Mr. WELSH.—Same objection.

A. I don't know that we put the Oregon numbers on the location marks or not.

(Testimony of H. S. McGowan.)

Q. Don't you know whether it was long after you located your net that you got the Oregon license?

Mr. WELSH.—Same objection.

A. We could do that any time, however, on the Oregon license, but whether we did it or not I could not tell you.

Q. You do know you posted your Washington license?

Mr. WELSH.—Same objection.

A. Yes, sir.

Q. You do know it was long after you got your Washington license?

A. It was subsequent. [504]

Q. It was after the suit began that you got your Oregon license?

Mr. WELSH.—Same objection.

A. No, sir.

Q. Now, you never operated a set net in front of Sand Island on the south? A. I never did.

Q. Did you? A. Personally I never did.

Q. Well, did you indirectly operate one?

A. Yes, I had other men employed in that business and was associated with others.

Q. How long did you operate a set net there?

A. Not very long.

Q. Well, how long?

A. Well, I guess we weren't actually operating but comparatively few days.

Q. How many days, about?

A. It may have been a week or two or three days, or ten days.

(Testimony of H. S. McGowan.)

Q. How many nets did you operate?

A. Well, I think perhaps we had two or three out at one time; we had a number in course of preparation, but we were just beginning so far as our set nets operations were concerned.

Q. You had about three set nets out and operated them a week or ten days, maybe two weeks?

A. We had two or three out at one time; we had them on different locations, but I don't think we had more than three in the water any one particular time.

Q. And they were operated there ten days, or possibly two weeks?

A. Might have been that long; the season had actually not begun for that sort of fishing.

Q. How many fish did you catch in them?

A. I don't know that we caught any fish, but we evidently [505] caught some fish, but I don't know that we got any home. I think we had some fish swiped from us; I don't know, but I think we did. We had not taken up our headquarters so as to guard the nets and take care of them continuously.

Q. You do not know whether you caught any fish or not? A. No, sir.

Q. I understood you to say, in determining the value of a fishing right, that its value entirely depends on the profit made from it. If there is no profit made from it, it is of no value as a fishing ground?

A. Generally speaking, that is true.

Q. Yes, that is true of every business. Now, in estimating the value of this fishing right—this alleged fishing right of yours south of Sand Island, you have

(Testimony of H. S. McGowan.)

assumed, of course, that you had the exclusive right to operate set nets there, haven't you? A. Yes, sir.

Q. If you did not have the exclusive right to do so, your value would depend largely upon that question?

A. Well, it might depend on that question to a certain extent; to what extent, I don't know.

Q. You never knew of anyone operating a set net there other than such set nets as you attempted to operate on these grounds yourself?

A. No, that is not in the way we contemplated to operate them.

Q. Or anyone? A. Oh, yes.

Q. On the south side of Sand Island?

A. Yes, sir.

Q. Who operated there?

A. I cannot give you the names, but I have seen dozens out there some days, right on the same location. [506]

Q. That is gill nets?

A. They were using their gill nets as set nets.

Q. They weren't anchored?

A. They were anchored.

Q. On both sides?

A. I do not know what you mean by that.

Q. Both ends?

A. They were anchored all the way long they were in the water.

Q. What sort of anchor did they have?

A. They had leads on the bottom of their nets, and they knew the leads were heavy enough to hold them there at that time.

(Testimony of H. S. McGowan.)

Q. Those were the only ones you saw operated there, gill nets?

A. Yes, other than ours. They used them as set nets, however.

Q. That is right square where you had your set nets? A. Right there in the same country.

Q. In the same locality?

A. I could not say in the same locality, in the same vicinity.

Q. You saw them?

A. Yes, I saw them; sure, I saw them.

Q. How did they get in there?

A. Some of them sailed in there; I don't know about any motors in their boats. Sometimes they were rowing in, and sometimes they would sail in.

Q. So, as a matter of fact, when it comes right down to brass tacks, these operations of the set nets in front of these premises by permanent anchors is a pure experiment, never has been tried, and you don't know whether it would work or not; it is only and simply an experiment, in the experimental stage, and you might possibly be mistaken in your theory?

A. No, I would not be mistaken, because it would have to be different from any other place I ever knew.
[507]

Q. But, I say, it is purely in the experimental stage?

A. Well, in a sense it is an experiment, as to the best results that can be gotten; other than that it is not an experiment.

Q. There never has been a set net operated there as

(Testimony of H. S. McGowan.)

a set net with permanent anchored ends?

A. Probably not, I don't know that there were.

Q. Therefore, Mr. McGowan, it must be an experiment; it can not be anything else?

A. Not in my opinion.

Q. Nobody has ever done it. You never saw anybody doing it, and no living man has ever tried it but you?

A. That is no reason that a man might not have an opinion that it was a mighty good place to do it.

Q. That is the point; that is the point; I don't question but what you might have a mighty good opinion. Now, the Columbia River Packers' Association in 1911 operated Sites Numbers 1, 2 and 3, didn't they?

A. Well, I could not say, I was not down there; I knew that they were the successful bidders from the Government for the use of the shores on sites known as Sites 1, 2 and 3, and I presumed they fished there; I was not down there.

Q. You stated in your direct examination that you at one time acquired the fishing right in front of Site No. 2, I believe; wasn't it Site 2? A. Yes, sir.

Q. That fishing right that you name, that claim that you purchased, covered all of Site 2? A. Yes.

Q. Did it cover all of Site 3?

A. No, I don't think it covered all of Site 3, but it covered more than Site 2. [508]

Q. What was its length?

A. There was one purchased that we made from Brumbach that covered 4,000 feet, approximately,

(Testimony of H. S. McGowan.)

and from the Reischman Brothers, why, my memory may be a little faulty, but in the neighborhood of 3,500 feet.

Q. I understand you to say they had virtually no claim; you simply bought that as a matter of security?

A. That gives merely a general idea of it, but there was an overlap in the Brumbach ground, and in the Reischman ground; that is to say, the Reischmans thought their rights ran further up than Brumbach thought, and Brumbach thought his run further down than the other thought; there was an overlap there and we wanted to clear the whole thing up. We knew it was a valuable fishery and we did not want to have any controversy, and we purchased both, and we acquired 4,000 feet, something like that, and 3,500 feet, making about 7,500 in all. But there was an overlap there and we lost out on the overlap.

Q. About how much did you have after strengthening up your—

A. I should say we had from 6,400 to 7,000 feet.

Q. But that did not include all of Sites 2 and 3?

A. No, it did not include all of Sites 2 and 3.

Q. But your set nets included all of Sites 2 and 3?

A. The ground at that time extended down further, and not quite so far up, you see?

Q. Now, you bought this right you spoke of from a man by the name of Brumbach? A. Yes, sir.

Q. Brumbach lived in Washington?

A. Yes, sir.

Q. He was operating under a Washington license?

(Testimony of H. S. McGowan.)

A. He sure was. [509]

Q. Had his Washington license number up?

A. I think he had his license up.

Q. And he claimed it by virtue of the Washington laws? A. So far as I know he did.

Q. Never had an Oregon license, did he, to your knowledge? A. Not to my knowledge.

Q. You bought it, did you not, as a Washington license? A. Yes, sir.

Q. You operated it from 1903 until you lost out on your bid to the Government under the Washington license, exclusively?

A. We operated in 1903, 1904, 1905, 1906 and 1907, under the Washington license.

Q. Never had an Oregon license?

A. Not up to 1908, I don't think so.

Q. You got the Oregon license after the suit had been brought by the State of Washington against the State of Oregon to determine where the boundary line was?

A. I think while that suit was pending.

Q. As a matter of caution? A. Yes, sir.

Q. Whatever rights Brumbach had he claimed to have acquired them under the laws of the State of Washington—claimed as fishery rights?

A. You mean Brumbach?

Q. Yes.

A. So far as I knew he claimed under the laws of Washington. [510]

**[Testimony of Moses Hirschy, for Defendants
(Recalled).]**

MOSES HIRSCHY, witness heretofore produced on behalf of the defendants, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

I am the same party that testified here yesterday, and I am the same party that worked for plaintiff in its fishing operations in front of Sites 2 and 3 in the Columbia River. I have been near Sites 2 and 3 on Sand Island for the last four or five years, that is the license, when they used to nail up the licenses I nailed them up myself. Of course, I don't know on the land. I know on the land where the location of Sites 2 and 3 are. I have seen the licenses there; I put them up. The plaintiff caught most of our fish on Site No. 2; that is, what I would call Site No. 2; but here and there sometimes we made a lay out below No. 2 and landed on No. 1, but very seldom. We got most of our fish on No. 2 ground. We would lay out below the "Republic" wreck and land mostly down below it. Of course I know where we landed. I could not tell you from the land, but we landed on Sand Island. I said we fished in front of Sites 1, 2 and 3, but we laid out on No. 3 sometimes and landed on No. 2—strong flood we landed on No. 3. We used to take the fish out of the net in front of Site No. 3; not always, understand; sometimes you go down for instance, for an hour or two strong flood, you lay on

(Testimony of Moses Hirschy.)

the upper end of the island. When your tide slacks up you get down into No. 2 and lay on No. 2 until you think it is fit to fish. When we think it is time to make a haul we lay out where we think it is fit, that is all I know about this; but most of the fish was caught in front of Site No. 2. I think there was some fish caught in front of Site No. 1. We lay out on No. 2 six hundred and some feet, I could not say, 500 feet—I never surveyed or measured it. We lay out on No. 2 and close to the “Republic” and we might land on No. 1; I could not say, I [511] never thought I would come up here. I think they caught practically all or most all, of their fish in front of Site No. 2. There is no question about that in my mind; that is my judgment. I was there on the ground nine years every year. I don’t ask anybody, I just tell my own judgment; I found that out if you ask anybody—I just tell what I know, that is all.

Cross-examination.

(Interrogated by Mr. FULTON.)

Chris Hansen and Olsen operated Site No. 2 in 1907. The Columbia River Packers’ Association rented it in 1911 and Chris Hansen and Olsen operated Site No. 1 in 1908, 1909 and 1910. The people who had Site No. 1 could do nothing unless they had something on ground No. 2. No. 1 was not fit, you could not do nothing. No. 2 and No. 1 kind of worked together and made a fair ground. There was someone operating Site No. 1 during 1908, 1909 and 1910. In laying out a drag seine in front of No. 1 the seine

(Testimony of Moses Hirschy.)

would be put out, say as a matter of fact, in front of Site No. 2.

Witness excused.

**[Testimony of H. S. McGowan, for Defendants
(Recalled).]**

H. S. McGOWAN, one of the defendants herein, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

Q. Mr. McGowan, with reference to Site No. 1, the Government site in front of Sand Island, tell us what you know about that with reference to being practical to fish in front of it, and what you know about the waters there for fishing purposes, in front of that Site No. 1. [512]

A. Well, it depends largely on what you want to use it for. Out in front of Site No. 1 a good deal of drifting is done with gill nets. I mean far enough out so that nets coming down will go clear of the "Republic" wreck, and go on down below. The "Republic" wreck is from 600 to 900 feet outside of low water. And if you mean in relation to the use of drag seines in a profitable way, why, Site No. 1 is almost, if not entirely, valueless, but almost valueless in order not to be able to utilize No. 2, lower end, because that is where deep water is and there is where you are in close proximity to the fish that come in. Now, the great "Republic" wreck lays at a point approximately 700 feet easterly of the west line of Site No. 2, so that there is a distance of between six and seven hundred feet from the "Delhara" wreck,

(Testimony of H. S. McGowan.)

before you come to the westerly limits of Site No. 2. In drag seining, the business that the plaintiffs were carrying on there, there was not room enough in that six or seven hundred feet to make a real seining ground, but the real valuable part of the seining ground was there, because the waters caused them to go in pools, and they could take the fish out on the lower end of Site No. 2, just below the wreck; but when there was an ebb tide running, in order to land those fish in a drag seine you would swing down on to Site No. 1, properly speaking, and make your landing.

Q. Then, according to your idea, there weren't a great many fish in front of Site No. 1 as compared with No. 2?

A. Not in a practical way to catch them. If you ran a net out in front of Site No. 1 without anchoring on No. 2 at all, you would get just the edge of the main deep waters where the fish were, and you would get some fish, but if there was any tide running you would not have any room [513] to bring your net in and land it without going into the rough waters of the breakers. Most of the time there is bad water. You get down in front of bad water and you cannot handle your net; you can make it fish too much; you have no good place to land it.

Q. In the cross-examination of Mr. Hirschy, Mr. Fulton brought out testimony of someone having used Site No. 1 for fishing, do you know anything about that?

A. A man by the name of Chris Hansen, I think

(Testimony of H. S. McGowan.)

his name was, he had Site No. 1 rented from the Government. I am talking about the beach, the shore, not a fishing right; he had that beach rented from the Government for the years 1908, 1909 and 1910, if I remember correctly, and he seined there. I believe he seined there during those three years, and he had the same kind of a tentative arrangement that he made with the agent of the 'Columbia River Packers' Association, whereby he used the westerly end of Site No. 2 from the "Republic" wreck down, in conjunction with Site No. 1, and during 1908 and 1909 he did not do very much business, even when he had that slight advantage.

Q. You mean that he did not catch much fish?

A. He did not catch much fish. It was not very profitable, in fact, he did so poorly in 1909 he wanted to shut off, he wanted to get out, but conditions were much more favorable in conjunction with the use of it in 1910 than it had been in 1908 and 1909, and he made a large catch down there. He made a big catch down there; I don't know how many fish he caught, but he got a lot of fish.

Q. What year?

A. 1910. Then the following year for 1911, and the succeeding two years, the Columbia River Packers' Association were [514] the high bidders on Site No. 1 as well as two and three, for the use of the shore.

Q. You say one year he made a good catch. Could he have made this catch without having fished in front in the waters of Site No. 2?

(Testimony of H. S. McGowan.)

A. In my judgment he could not.

Q. Did you see the plaintiff fishing in 1911?

A. In 1911?

Q. Yes.

A. I don't think I was down on those grounds during the year 1911, that is, during the fishing season of 1911. I think I was down on the island once in 1910. If I was down there at all, I was on Site No. 1 and also Site No. 2. I know that Hansen made arrangements with the Columbia River Packers' Association, because he told me so himself. My knowledge is that Chris Hansen was using the ground, that part of No. 2 as well as No. 1, and he had a quarrel with Hawkins, and Mr. Hawkins prevented him from continuing using it, and they had a squabble and the result was, to the best of my knowledge, and possibly Hansen partly receded from his position and Hawkins receded partly from his position, and the Columbia River Packers' Association got his catch of fish and he had the convenience of that end of the ground given to him.

Q. And he made a good catch?

A. He made a big catch, yes, sir.

Mr. WELSH.—Q. He fished in front of what site?

A. In front of the lower end of Site No. 2.

Mr. FULTON.—Q. In operating drag seines it is the universal custom to put the seines out in the water anywhere they can put them, regardless of site lines and shore. They have a right to navigate the waters? [515]

A. I don't know; some people have one theory

(Testimony of H. S. McGowan.)

about it and some another.

Q. Isn't that the universal custom?

A. No, sir, I don't think it is.

Q. Do you know of a place where it is not so employed—where it is necessary to do so?

A. Why, I think a man operates a fishery if he owns the fishery.

Q. Wait a minute, that is not the question. I do not care to get into theory with you, because you are too theoretical and don't have much regard for the facts, when your theory goes up against it. Do you know of any place on the Columbia River where drag seines are employed and where it is necessary for the operator to put his seine in water above lands belonging to other people that he does not do that, or that it is not done?

A. I think that is true in case the party who owns uplands where it is necessary; there are no conflicting rights.

Q. They are in the water?

A. Certainly, they are.

Q. Their navigating the water with other fish appliance they are not interfering with anyone else, and naturally one operating Site No. 1 at an ebb tide would of necessity put his net in the water in front of Site 2, but it would be in the water. Have you got a map of Site No. 2?

A. No, I haven't. Do you want to put that in evidence?

Q. I would like to.

A. If you would undertake to get me another one

(Testimony of H. S. McGowan.)

I would be willing to have it go in.

Mr. WELSH.—Put it in.

Mr. FULTON.—Q. Is it a correct map of the south shore of Sand Island delineating Sites 1, 2 and 3, for all practical purposes? [516]

A. It purports to be, it is not a good map of the south shore of the island, though.

Q. I mean for all practical purposes, it gives you a pretty good idea?

A. Generally speaking, it is a fair map.

Q. Those sites on there, marked Sites 1, 2 and 3, refer generally to—rather are Sites 1, 2 and 3 in controversy in this suit? A. Yes, sir.

Q. Of course, it has high land in front of Sites 3 and 4—back of Sites 3 and 4 it is high ground, the water does not run over it?

A. It does not now; there was a time when it did.

Q. It has not for the last number of years?

A. For a year or more the water has not run over it.

Q. The ground is above high tide?

A. Yes, sir.

Q. On the map it appears that the land there is below high water, doesn't it? A. Sir?

Q. It shows on the map as if portions of Sites 3 and 4 are below the high water? A. Yes, sir.

Q. But as a matter of fact it is not now?

A. Well, there are parts that are continually above the high-water line, all along there.

Mr. FULTON.—Just for the information of the Court, and with the consent of Mr. McGowan, I will

offer this map in evidence.

Thereupon said map was offered in evidence and marked Defendants' Exhibit "F."

Witness excused. [517]

**[Testimony of Ralph Grable, for Defendants
(Recalled).]**

RALPH GRABLE, a witness heretofore produced on behalf of defendants, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

I am familiar with Sites Nos. 2 and 3 on Sand Island. In my judgment it is practical to operate the drag seines in front of Site No. 1 providing you can lay out the drag seine on Site No. 2 and land the seine on Site No. 1, but you practically catch the fish on Site 2, because there is another wreck, you must remember, which is one hundred fathoms from the "Republic" wreck—excuse me, two hundred fathoms from the "Republic" wreck, to the "Delhara" is as near as any fisherman can claim, about two hundred fathoms; and if you lay out there and catch this "Delhara" you might just as well catch the "Republic." It is only one hundred fathoms at low tide. Therefore, in my opinion, as a fisherman and with my knowledge of the actual grounds there you could not fish in front of Site No. 1 with a drag seine without fishing in front of No. 2. I am positive of that, because a man cannot run a seine for the simple reason I have seen these seines snag on the "Delhara" and they could not bring the seine ashore

(Testimony of Ralph Grable.)

on Site No. 1, and I have seen the plaintiff operate its seines there. The main fishing was done on Site No. 2, that is, in the waters in front of Site No. 2.

Cross-examination.

(Interrogated by Mr. FULTON.)

Olsen and Hansen operated Site No. 1 during the years 1908 and 1909 and 1910. They caught fish but they did not catch it altogether on Site No. 1, simply because they laid out on Site No. 2. They laid out in front of Site No. 2, because the ground [518] of Site No. 2 is 620 feet, according to the measurements, below the "Republic" wreck. They take their seines west of the "Republic" wreck.

Q. In other words, the gentlemen who operated Site No. 1 put their drag seine in a gasoline launch and then sailed the gasoline launch in the waters of the Columbia River and put out their seine in front of Site No. 2 and hauled it out in front of Site No. 1; that is about the way they did it?

A. Your Honor, I will tell you during all the fishing I ever saw on the ground, that if a man would only have Site No. 1 with grounds and seines that were fishing they could not fish Site No. 1 at all.

Q. After delivering that oration, answer the question. I said that the way that the gentlemen that operated Site No. 1 did was to put their drag seine in a skiff—I presume they used a skiff or a gasoline launch? A. Yes, sir.

Q. And they towed the skiff out into the waters in front of Site No. 2 and put their seine into the water, and then landed on Site No. 1?

(Testimony of Ralph Grable.)

A. Yes, that is what I said.

Redirect Examination.

(Interrogated by Mr. WELSH.)

Q. From your observation and your opinion as a fisherman we could, in front of Site No. 2—

Mr. FULTON.—I object to that as leading and suggestive.

A. The fish are caught on No. 2, because you cannot fish on No. 1 on account of the "Delhara" wreck in the middle of No. 1 current. I saw their seine snagged there in slack water when it was supposed to be their best haul, is the slack water haul.

Witness excused. [519]

**[Testimony of Amon Markham, for Defendants
(Recalled).]**

AMON MARKHAM, a witness heretofore produced on behalf of the defendants, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

I am the same person who testified yesterday and I am familiar with the sites in front of Sand Island known as Sites 1 and 2.

Q. You have been familiar with this location for a period of a great many years?

A. Must I answer the same as I did yesterday?

Q. Yes.

A. I have been fishing, outside of the capacity of deputy sheriff, and when I went to Alaska, for thirty-four years, living in Pacific County.

(Testimony of Amon Markham.)

Q. During all that period you have been acquainted with the Columbia River?

A. I certainly have.

Q. And in front of Sand Island?

A. Yes, sir.

Q. Now, you may state whether or not the plaintiff could fish in front of Site No. 1 for salmon fish?

A. Land a seine? Absolutely nothing.

Q. Why not?

A. There is a wreck—if I had to, I could draw a map.

Q. Just tell it in your own way and it will be all right.

A. After you leave the wreck of the “Republic,” about 500 or 600 feet you meet the “Delhara,” and you cannot land.

Q. The “Delhara” is in front of what site?

A. No. 1. [520]

Q. What is the “Delhara.”

A. It is a wheat laden ship; she was sunk there.

Q. It is a wreck? A. Yes, it is a wreck.

Q. You saw the plaintiff operating a drag seine, did you?

A. I used to fish there with a drag seine, yes.

Q. Then you say it is impracticable and almost impossible.

A. It is impossible to land a seine, because you pick up this wreck.

Q. In Site No. 1. A. Yes, sir, Site No. 1.

Q. The plaintiff's fishing operations was confined

(Testimony of Amon Markham.)

to what site? A. To No. 2.

Q. In front of No. 2? A. In front of No. 2.

**[Testimony of H. S. McGowan, for Defendants
(Recalled).]**

H. S. McGOWAN, one of the defendants, was again recalled and upon interrogatories propounded to him by counsel for defendants testified as follows: (Interrogated by Mr. WELSH.)

I have had experience in fishing the waters of the Columbia River just south of and in front of Sites 2 and 3 of Sand Island. Speaking more particularly with reference to Site No. 3, during the year 1909—well, all the years from 1900 onward, and particularly with reference to the years 1905, 1906 and 1907, because the operations were carried on those years more in view of the limit lines of those sites. You see previously to 1905—I think it was 1905, there was no such thing known as Sites 1, 2, 3 and 4, but about the year 1904 or 1905, I believe it [521] was, the Government wanted to divide the island up, and that is what they did. They surveyed and made plats, substantially like this plat that was introduced in evidence this morning, marked Defendants' Exhibit "F," dividing the land into five sites. We were operating on Site No. 2. I do not have the record of the fish I caught during those years on that site, but speaking from memory, to the best of my knowledge and belief, I would say that in 1905 the catch on that site was approximately about 150 tons of salmon fish; in 1906 I think was about 220 tons,

(Testimony of H. S. McGowan.)

and in 1907 I think it was less. I think probably 120 tons, maybe.

Q. From your knowledge and experience as a fisherman and from the experience you had in fishing the waters in front of this Site No. 2 and from your knowledge of the location, state in your opinion what number of fish would have been caught by the defendants each year during the years 1908 to 1911, both inclusive, if they had been permitted to fish the location and had they not been enjoined in this suit.

To this question counsel for plaintiff objected upon the ground that it was incompetent and irrelevant and speculative.

A. Covering Sites Nos. 2 and 3 I would say on a general average we ought to have gone somewhere in the neighborhood of a couple of hundred tons, each year.

Cross-examination.

(Interrogated by Mr. FULTON.)

I operated Site No. 2 in the years 1905, 1906 and 1907, that is in front of it. Not under a lease from the Government, but in a secondary way. We operated our own fishery right there, but we used the beach in drag seining, and for the use of [522] the beach we got the right from a man by the name of Stensman, who leased it from the Government. Stensman was the highest bidder for Site No. 2 for 1905, and he bid for himself and not under any agreement with me. The Stensmans were interested in fishing down there, in fact had the ground there below the "Republic" wreck, now the lower end of

(Testimony of H. S. McGowan.)

No. 2 and the upper part of No. 1, and Stensman of course did not want to give up his seining business there, and he wanted to bid in order to do so and he did, and in order to bid at all on the ground he had previously, he had to bid on Site No. 2, and he was the highest bidder and we leased from him during all those years we operated a drag seine. We made no attempt to put set nets in front of said site during those years. I was one of the bidders for the Government sites when these sites were offered for leasing in 1908; that is, I think I was for the shore only. I think I bid for Site No. 2 in the neighborhood of \$1,000 per year. I could not tell you the exact figure that Stensman bid for the lease of Site No. 2, but it was more than a thousand. I don't recall whether I bid for Site No. 3 in 1908 or not. My impression is I did not, but I might have done so. Again when the sites were offered for lease in 1910 I think I was a bidder. The Government at that time offered to lease them again for three years. I think I was a bidder for Sites 2 and 3. If I remember right, I bid for the use of Site 2 in the neighborhood of a thousand dollars, but I do not recollect what my bid was for Site No. 3. If I bid at all it would be somewhat less than that; I think it would be considerably less than that.

In the 150 tons of fish that I caught in 1905 there would be a few bluebacks, not many; the bluebacks were practically done with when we started seining along about the first of July, so that is almost a negligible quantity, but there would be quite a number

(Testimony of H. S. McGowan.)

of steelheads. The percentage of steelheads might be [523] ten or fifteen per cent, some years might be higher than fifteen. Chinook salmon under ten or eleven pounds would be a very small percentage. We do not catch small salmon down there.

Redirect Examination.

(Interrogated by Mr. WELSH.)

When I spoke of bidding for Site No. 2 in 1907 I could not tell you whether it was under my name or the name of P. J. McGowan & Sons that I made the bid. P. J. McGowan & Sons is a corporation organized under the laws of the State of Washington; I am president and general manager thereof. If I had bid personally my bid would have been for the corporation, and if I had been successful it would have been for the benefit of both myself and the corporation. There could not have been a corporation without benefiting myself, but I could not tell you whether I bid in the name of the corporation or whether I bid in the name of myself.

[Testimony of Erick Lindstrom, for Defendants.]

ERICK LINDSTROM, one of the defendants and a witness on behalf of the defendants, after being first duly sworn, testified in answer to interrogatories propounded to him by counsel for defendants, as follows:

(Interrogated by Mr. WELSH.)

My name is Erick Lindstrom. I reside at McGowan, Pacific County, Washington. I am an employee of P. J. McGowan & Sons, and my occupation

(Testimony of Erick Lindstrom.)

is that of a fisherman, having been engaged in that business with said company about nineteen years [524] and fishing on the Columbia River during all of that time; I am one of the defendants in this action; I am acquainted with the waters lying south of Sand Island and in particular with the waters south of sites numbered 2 and 3 and Site No. 1 thereof. There is an eddy there extending from the upper end of the island to what is called the great "Republic" wreck, just on the lower end of Site No. 2. Its width is different according to the tide, but I think at any time—I am sure at any time it extends out from 75 to 100 fathoms, that is 75 or 100 fathoms south of the island at extreme low tide. I think I can account for what causes this eddy to be there, the water is not very deep there, and the water forcing down, if this was an ebb tide, from Baker's Bay and upper river, is driving the water so fast into the deeper water, it backs up along this shore in shallow water and makes it whirl around and form an eddy; and the same thing with flood tide coming from the ocean, it forces the water so swiftly into deep water, in shallow water the water cannot follow this up, and it backs up and makes an eddy. There is a little bay on Site No. 2, which is a bend there, and this bend produces this effect, that the water forcing over striking that point there, runs into this bay, and of course that forms an eddy.

I know where my set nets were located in 1908. The location was planted in six feet of water, one fathom, and from 75 to 100 fathoms in the water

(Testimony of Erick Lindstrom.)

from the shore, as near as I can tell, and that was practically true with reference to the two sites of the other defendants. I placed these set nets in the water for the purpose of catching salmon fish to use for canning and freezing, that is for cold storage and salmon packing. These salmon always have had a market value and always have been very valuable fish. These set nets were all located in this eddy I speak of and on the south side of Sites 2 and 3 from the south [525] of low-water mark, extending out into the river about the length of the net that we expected to use.

The price of salmon for 1908 was five and a half cents and seven cents, I think it was—I am not positively sure. Small salmon go about five and a half and six, I think it was five and a half, and cold storage fish was seven cents, that is for fish over twenty-five pounds. The price of salmon for 1909 was about the same it was during 1908. In 1910 I think they raised the smaller salmon to six cents and the big salmon, I am pretty sure that they brought over seven cents; at any rate, I would not say a quarter or a half a cent, but they were seven cents or more. In 1911 the cannery fish, what they use for canning, was six cents and cold storage over twenty-five pounds seven cents a pound.

In the place where myself and the other defendants had our set nets and our locations, to my knowledge I know they were good places for fishing for salmon fish. This place is noted for catching more fish than any other place on the Columbia River.

(Testimony of Erick Lindstrom.)

This was away above anything that there is in the river that I know of. I have had experience in operating various kinds of fishing gear in the waters of the Columbia River. In my judgment this place was the best place for operating set nets on the Columbia River, because there is an eddy and that is just what we want for set nets. Furthermore, the fish goes into the eddy and they don't only come like they do in the channel. When they are out in the main current they keep going up—the natural nature of the salmon is to go upstream; but fish coming from the bar, it seems like they have Sand Island for a sort of a resting place, and they lay around in there for some time, and seem to go in all directions. A man there with gear fit for fishing is bound to catch fish. There is no doubt about that whatever, and that is true with reference to our set nets. [526]

Q. I want you to tell me where the place in the Columbia River is that is used as a general fairway and course by gill net fishermen in plying their vocation?

A. That is out where the current runs; that is what is called drift nets; they are supposed to drift, they are not supposed to go in an eddy, they are drift nets, and they lay out their nets and drift with the current. This current that I speak of is on the south side of our locations.

(Witness continuing:)

If I had not been enjoined by the injunction in this suit I would have fished my set nets for salmon fish to catch salmon and make money, that is what

(Testimony of Erick Lindstrom.)

our calculations were. I know of fish being caught in the waters south of the locations 2 and 3. I haven't been much on the island there. I saw the island and saw two hauls made by P. J. McGowan & Sons who were operating in 1907, and I was watching them make two hauls; they were operating a drag seine, and that is the only fishing I ever saw there. They got about a ton to each one of them hauls. I have not personally seen any other fish caught there, but I know from friends and parties that fished there, and from the catches that has been made there, and from the reports, it is the greatest fishing place on the Columbia River.

Q. Can you from your knowledge and experience, and from the observation that you made or saw, the two hauls there made by P. J. McGowan & Sons, give your opinion as to the number of fish you defendants would have caught each year had you been permitted to operate your set nets, that is all the nets on the two grounds?

To this question counsel for the plaintiff objected upon the ground that the witness was incompetent.

A. Picked up about 200 tons each year of salmon fish. [527]

Q. Do you know the rule, if there is any rule, as to the price paid, if any price is paid, by parties who desire to lease fishing grounds by the year, in the Columbia River? A. Yes, sir.

Q. You may state what it is.

Mr. FULTON.—I object to that as immaterial and incompetent.

(Testimony of Erick Lindstrom.)

A. I know—I have not leased any myself, but I know P. J. McGowan & Sons have leased seining grounds on the upper Columbia River, on the conditions giving one-half of the entire catch for the lease, by furnishing the lease on the ground and the gear.

Mr. FULTON.—I move to strike the witness' answer as immaterial, irrelevant and incompetent.

Mr. WELSH.—Do you know what the rule is where the party simply furnishes the location without furnishing any gear?

Mr. FULTON.—Same objection.

A. To my personal knowledge, my brother—

Q. Do you know what the rule is, yes or no?

A. I want to explain how the lease was made, which I know personally. The general rule is when they lease the ground only, that the owner of the ground has the fishing right only gets one-third of the gross catch, and the man that furnishes the gear and does the work gets the two-thirds, but on a valuable place—I know my brother was fishing an eddy and I helped him, and sometimes—that was in the year '96, he caught 83 tons of salmon in set nets. Of course, leasing the ground from P. J. McGowan he furnished his own gear—it was a valuable piece of property and fish was there, and he could catch them with a set net, and he got two cents less, on the market value, for the gross catch.

Q. What was the market value at that time?

A. They were about five and six and a half cents.

(Testimony of Erick Lindstrom.)

Q. That would be practically one-third that you paid for the use of the ground? A. Yes, sir.

Q. Is that the general market value?

Mr. FULTON.—I object to that as leading and suggestive.

(Question withdrawn.)

Q. State what the general annual market value of grounds for fishing locations, such as the defendants had, would be worth.

Mr. FULTON.—I object to that; the witness is incompetent. The testimony is irrelevant.

A. The market value, you mean with reference to our set net locations there?

Q. Yes. A. For each year?

Q. Yes. A. The price of the fish for 200 tons?

Q. One-third of the price of 200 tons of fish each year, is that what you mean? A. Yes, sir.

Q. Do you know of anything that I have forgotten, Mr. Lindstrom, that I ought to have asked you about? A. No, I don't.

Q. With reference to these different sites, known as Government sites on Sand Island, are you familiar with the waters of the Columbia River immediately joining and south of that? A. Yes, sir.

Q. With reference to Site No. 1, what can you say with reference to that, regarding whether or not it would be practical to operate a drag seine in front of it?

A. I would not tackle it myself, unless I could use part of No. 2 ground that lies in between No. 1 and the great [529] "Republic" wreck.

(Testimony of Erick Lindstrom.)

Q. Why couldn't you fish in front of Site No. 1 alone?

A. The current is laying so close to the breakers there, there would not be time or chance to get the net in with any current that would set towards the ocean, towards those breakers, it would not give the man time to get the net in before you took a chance of losing your life and your gear.

Q. Did you see the Columbia River Packers' Association operating in 1911, their drag seines?

A. I did.

Q. Where did they operate, in front of what site?

A. No. 2.

Cross-examination.

(Interrogated by Mr. FULTON.)

The Columbia River Packers' Association did not put their seines out while I was there. I did not see the seines laid out; they laid it out on Site 2 and was working there. When the net was in the water it was not in front of Site 3 at all. They laid it out on Site No. 2 and was working there. I watched them and saw them, saw that. I wanted to see the engineer, and I saw them have the net in the river in front of Site 2; where they laid it out I could not tell you, I was not there. The net was on Site No. 2 when I saw it; it was drifting down towards the "Republic" wreck. I did not see where it was put out. I saw them hauling it in.

I have been working for P. J. McGowan & Sons for the last eighteen or nineteen years, something like that. I have run seines for P. J. McGowan & Sons

(Testimony of Erick Lindstrom.)

on the upper Columbia River and lower Columbia both, foreman of the grounds. They ran on the [530] Jetty Sands in 1911; ran on the Hogsback from Tongue Point. I also seined on the Tenasillhee Island. Tenasillhee is further up the river, and we have the same back current up there and the same eddy, although it is a little eddy there. The river does not run as swiftly there as it does at Sand Island, because it has two channels there, the Cathlamet Channel and the main channel. I don't think it runs so swiftly there.

I helped put out the locations of the defendants, P. J. Coyle, myself and the engineer of the boat; the boat was McGowan's gasoline boat; we had the locations on the gasoline boat. Coyle and myself had made the locations and built the buoys, and they were placed on the boat by us and the assistance of others. At the time we made these locations and buoys Coyle and I were working for McGowan on a salary. McGowan furnished the material to make the buoys. The engineer was also working for McGowan. McGowan was not present at the time the locations were made. I never paid for the launch and I never fished either of these locations myself; neither did Coyle to my knowledge, and neither did McGowan, but we hired a couple of men from Chinook. I don't know who paid them, I did not. I don't know whether Coyle paid them or not. I don't know how long these men fished; I don't think they were fishing very long; I don't know how many fish they

(Testimony of Erick Lindstrom.)

caught and I never inquired how many fish they caught, and I never inquired how long the set nets were operated. I never heard of anybody operating a set net in front of Sand Island and I don't know whether set nets were ever tried there. I never inquired whether set nets had ever been tried there; never made any inquiry in that regard from anybody; but I think if I had been allowed to operate these set nets I would have caught 200 tons which would have been worth about \$26,000. I do not think that I would have made \$26,000 alone. I am basing my [531] estimate upon the theory that I had the exclusive right to all of Sites 2 and 3 and to all of the waters in front of them. My idea was to operate the set nets not over 75 fathoms long, but I do not know how long the set nets were that were operated by the men I employed. I do not know where the men that I employed got their nets; they had the gear there on hand; I suppose they got them there. I must have been busy at something else at that time. The reason I did not inquire how much fish I caught there was that the locations were there and these men were hired for looking after these locations more than for fishing. We did not intend to start that soon, that early, for the reason that the ground on Sand Island is better fishing the latter part of June, July and August. There are more fish at that time because the waters get clear, but that is not the only reason. We cannot catch fish in muddy water in the set nets, they are the same as gill nets;

(Testimony of Erick Lindstrom.)

but it is better for gill net fishing in muddy water in daylight.

Redirect Examination.

(Interrogated by Mr. WELSH.)

It has been proved that our fish nets and locations were taken out by the Columbia River Packers' Association. I could not say whether they drove our men away that we had watching. I know that they came back to the cannery after some more buoys, that is to replace the ones that were taken away. They were up there for some more anchors and buoys to place in the place of those taken away. I didn't go down with them to plant them. [532]

Recross-examination.

(Interrogated by Mr. FULTON.)

The locations were taken away before we were ready to fish. They were not fishing from May the first—I don't know just exactly when we put the locations in there. I don't know how much fishing they did there.

Q. You had men there fishing from the first of May up until the time the plaintiff took the buoys out? A. The men were there.

Q. You put these buoys in the first of May, 1908?

A. I cannot remember just when we put them in.

Q. It was early in the first of the fishing season?

A. I could not remember who put the locations down there, but they were in the fishing season.

Q. It was in the fishing season, was it?

A. Yes, sir.

(Testimony of Erick Lindstrom.)

Q. How does it happen that you can remember anything in your favor, but when I question you your memory is awfully bad?

A. It ain't so worse.

Q. It might be worse, I admit, but do you remember if you put any locations in there?

A. I remember that.

Q. Was it in the month of April or February?

A. It was somewheres in the latter part of May, I guess.

Q. Latter part of May; the fishing season opens when? A. Opens the first of May.

Q. The 1st of May. Then you didn't put them in the 1st of May?

A. I cannot just remember; I told you that I cannot remember when we put them in there.

Q. But you did put them in there in the month of May? A. I am pretty sure it was in May. [533]

Q. The testimony shows they were taken out the 21st of June, 1908? A. Yes, sir.

Q. These men you had fishing were fishing from the 1st of May, sometime during the month of May, up to the 21st of June, didn't they?

A. I don't think they did; they wasn't hired to look after that.

Q. Didn't you swear not five minutes ago that you hired the men to fish these nets? A. Not in May.

Q. When did you hire them?

A. They were there before they started to seine.

Q. When did you hire these men—you sit there

(Testimony of Erick Lindstrom.)

and tell me you don't know when you hired these men to operate your set net?

A. I didn't hire them myself.

Q. You swore awhile ago that you did.

A. No, I didn't.

Q. You did not? A. No.

Q. All right. You say now you did not testify awhile ago that you hired, or "we" hired some men?

A. "We" did.

Q. That is you?

A. We all three were in company.

Q. You knew they were hired? A. Yes, sir.

Q. Sure you did. You hired them, didn't you?

A. Yes; well, that is "we."

Q. You said one time you did not hire them, and another time you said "we" did.

A. We did. [534]

Q. You were one of the three that hired them?

A. Yes, sir.

Q. You knew they were hired? A. Yes, sir.

Q. When was it they were hired?

A. My recollection, which is not so bad, is that I think it was in May or June, somewheres around there. They were not there from the time the buoys were planted there. They were only there a few days; what days that was I cannot just recollect.

Q. You do not want to remember very well, do you?

Mr. WELSH.—I object to the question, it is not fair.

(Testimony of Erick Lindstrom.)

Mr. FULTON.—Q. I say, you do not want to remember?

A. Well, I cannot remember when those men were there.

Q. You have no idea?

A. They were there before the buoys were taken away from there.

Q. Nobody asked you that; do you remember how long they were there—you hired them, didn't you?

A. The men were there; I don't think they were there over a week.

Q. You do not think they were there over a week?

A. I don't think so.

Q. Still you think you hired them some time in the month of May?

A. (Hesitating.) Well, I have said now, again, that I don't remember whether it was in the month of May or the month of June, I cannot remember that; I didn't put those things down and I cannot remember. [535]

Redirect Examination.

(Interrogated by Mr. WELSH.)

The only thing that I know the men came back there and told us the buoys were taken out, some of them, I don't know how many. They came back for more material to put in new ones. They did not tell me who took them out, but their opinion was the same as others testifying, that the Columbia River Packers' Association took them out. I don't know whether the Columbia River Packers' Association

(Testimony of Erick Lindstrom.)

made any threats about killing anybody that attempted to operate these nets. I don't know whether there was any general rumor with reference to that.

Thereupon the defendants rested.

The plaintiff thereupon called the following witness on its behalf:

[Testimony of W. A. Latourell, for Plaintiff.]

W. A. LATOURELL, a witness on behalf of the plaintiff, after being first duly sworn, testified in answer to interrogatories propounded to him by counsel for the plaintiff as follows, to wit:

(Interrogated by Mr. FULTON.)

I live at Troutdale in the State of Oregon; I have lived around Troutdale about forty years; all my life. I am forty-one years of age. My business is that of a fisherman; I set net and drift both, in the waters of the Columbia River. I have been engaged in that vocation about twenty-five years, ever since I was large enough to row a boat, both in operating gill [536] nets and set nets in the Columbia River. A set net is made of the same material and in identically the same manner as a gill net. Different size mesh are sometimes employed and different size twine but this is also true of set nets. The fish are taken by set nets only by being gilled therein, and it is not used as a drag seine and is employed at a fixed point; it is stationary. You have to have an eddy to set them in, where the eddy meets the current; where the current comes around some point and

(Testimony of W. A. Latourell.)

the eddy back flows. You set your net between the current and the eddy—between the two waters where the outside current comes around and your eddy comes back and you set the net in between them. That is about the only place you can hold them; probably you could set them down further in the eddy. The object of this is, you could not get anything to hold the net, you could not hardly put enough anchors on, and in the next place you would not take the fish; if it did, the first would be taken right out of the lines. A set net must hang loose, and if a set net is placed in the current or any place where the meshes are drawn taut, it will not take fish. It must be in a place where it hangs just normally to catch fish; if it is drawn too tight it won't take them. In order to catch by set nets you must have muddy water to catch them in the daytime, but at night-time you can catch them in clear water. The reason for this is, the fish see the net and don't go into it, and a set net will not catch any fish in the daytime in clear water.

If I am not mistaken, I think the waters clear up in the Columbia River about the tenth of July, so that from that on we don't get anything in the daytime. I am the owner of a set net location and I don't know of but one better location than mine on the Columbia River; that one is called the "Butler Eddy" and is operated by the McGowans. I lease most of my eddies. I have two eddies that I pay \$75 per annum for; the other one, I don't [537] know who it belongs to, I just use it. I think I have

(Testimony of W. A. Latourell.)

as good a set net location as there is on the Columbia River, with the exception of the one at Butler eddy, and I have been operating my set net locations off and on for twenty years, I guess—yes, twenty-five years. I operate one set net in each eddy.

I have been down to Sand Island and I examined it for the purpose of ascertaining whether or not set nets could be successfully operated there, but I did not give it any consideration or examination, I just looked it over for the purpose of ascertaining whether or not set nets could be operated there successfully. From my knowledge and experience as a set net operator I do not think there could be any fish caught there in a set net, for the reason that the tide is too swift. From my experience, you take water where it is running from—well, you might get fish in water running two miles an hour, but I don't think you could catch them hardly in that, and where the water runs anything over that, you don't have any success in fishing. I don't think set nets could be operated in front of Sand Island because the tide would be too swift; it would draw the net too swift and the meshes would draw up; and another thing, I don't believe you could hold a net there with the current they have there; and you take where the water is running so swift, if a fish strikes the net it would be drawed so he would not gill anyhow, and so I don't believe, in my estimation, they could catch a fish there. I do not think they could catch any fish if the net were sitting parallel with the current. I never tried mine that way and I don't see how they

(Testimony of W. A. Latourell.)

could. I saw no eddy such as could be used for set net purposes in front of Sand Island. It looked just like a straight beach to me; there were no points where the water swirls around. The beach is practically straight, but there might be a little alcove, but not to amount to anything; it is practically a [538] straight beach. When I was there it was flood tide.

In my judgment, the waters in front of the south shore of Sand Island would not be worth anything for set net purposes.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I have done all of my fishing on the Columbia River and Sandy River. My experience has been confined to drift nets and set nets. I never operated a fish trap; I have been on different drifts with drift nets, but all set netting was in the same place. I do not know how many set nets I have operated, that would be mighty hard to tell, but I have operated a good many. I have fished three of a season, then I have done some winter fishing. My operations were thirty miles above Portland on the Columbia River. I do not know how far that is from Sand Island. I have never fished in the neighborhood of Sand Island, but I have been there several times and on the island once. I was there last Thursday of last week; that was the first time I was ever on the island; that was the time I made the examination I spoke of in my direct examination. I went there at the request of the plaintiff to look at it; we were

(Testimony of W. A. Latourell.)

on the island about three hours, I guess, and the tide was flooding. It was ebb tide when we first went there, and flooding when I came away. I was opposite the great "Republic" wreck; I was on the shore. We ran down outside of the island and landed on the beach. I simply stood on the shore and looked out over the waters and studied the conditions from the shore. I know nothing of Sites 1, 2 and 3 on Sand Island excepting what I was told. When I was standing there watching the waters, I think, if I remember right, it was on Site No. 2, but I could [539] not tell you what part. It was right in front of the old wreck and during the three hour period that I was standing there I made up my mind that a set net could not be operated in those waters. I was enabled during that time to tell the action of the waters at all times at that place. I mean to say that on the south side of Sand Island there is a kind of a bay at the upper end and that is away above where we were. I don't think that the south side of Sand Island is of crescent shape; but I would call it a straight shore; there might be a little angle, but if there is it is very little. I meant to be understood as saying that there was no eddies in the waters in front of the island while I was there. I do not know how often the tide ebbs and flows in a day. I never fished on Sand Island and have had no experience in tidal waters. All I know about it is the way the river runs, the tide just seemed to come in and go out, and that is all there is to it. I have fished for twenty-five years, yet I

(Testimony of W. A. Latourell.)

do not know how often the tide ebbs and flows in twenty-four hours. You can tell from the shore whether there was an eddy in front of the island; I would not have to take a boat or go out to see. I think by standing there three hours I could determine with certainty whether or not there was an eddy in front of such island. It is simply a straight current flowing back and ebbing out. I could not tell you what the conditions would have been when the tide was flowing out at its highest. I saw that a set net could not be operated in those waters because the current is too swift for it. I doubt whether you could hold a net there or not. You could anchor it so you could hold it if you had strong enough weights, but in the next place in a swift current it would not take fish, because it draws the meshes of your net too close together they will not catch and draws them so tight they will not gill. If we had a net here we could see that. Take [540] a lead line here and a cork line here, it is bound to draw the meshes, stretches them out, closes the meshes up. In an eddy there is a whirling condition of the water but not where we fish. We set our net at the dividing of the current and the eddy, where the two currents meet, that is where we put our net. You don't have to have an anchor outside of the net. We tie it in the inside and it will lay out right there. I have never fished in tide water and I know nothing about it. You could not set your net with the current, you have to set the net between the current and the eddy; that is the only place you can handle

(Testimony of W. A. Latourell.)

a set net with any success, and if there is any such place on Sand Island the net can be operated there, but I did not see any while I was there. I have tried to operate a set net where there was a current. I have tried to force them, put the entire net out in the current, but I didn't have no success with it. It would draw the inside so tight the net would not fish any place, and I would have to take it up again. That was in the current above tide water. In set net fishing in the upper Columbia we cannot fish in clear water in daytime, but as quick as it gets dark we catch them. We only get about five hours fishing a certain part of the summer—about six hours. It gets light after three o'clock; after three o'clock you might as well go in, can't catch a fish. I do not know anything about the condition of the water at Sand Island as to its being clear or muddy. It might be a perfectly good location for set nets, but if it is I did not see it. When I was there they could not put a set net in.

The set net location that I leased belongs to the Gordon Falls Water Power Company. Thomas F. Ryan of Oregon City is president, and I pay him \$75 per annum for the two eddies. During the year 1911 I got only about three tons of fish, it was a poor year. During the year 1910 I think I [541] caught between nine and ten tons. I don't remember what I did get the year before that. I don't know anything about the number of fish at Sand Island. I never tried setting a net parallel with the current. I do not think it would work successfully.

(Testimony of W. A. Latourell.)

If you catch a fish the minute it draws on the end your fish is gone. If your mesh are too large the fish won't gill, and you cannot catch a fish with the net straight up and down the river; you would not get one fish.

I am not in the employ of the plaintiff and never have been. The plaintiff did not pay me for going there to make this examination. I simply went down. A friend of mine was running the cannery and he wanted me to go down with him. I went down at the request of Mr. Reed, an employee of the plaintiff. He told me he wanted me to go down there to look at the ground so I could be a witness in this case.

One of my set nets is about two miles above Bridal Veil Falls on the south side of the river, and the other one is about two miles above that. [542]

[Testimony of H. R. Reed, for Plaintiff.]

H. R. REED, a witness on behalf of the plaintiff, after being duly sworn, testified in response to interrogatories propounded to him by counsel for plaintiff as follows, to wit:

(Interrogated by Mr. FULTON.)

My name is H. R. Reed. I am at the present time running a cannery for the Columbia River Packers' Association at Rooster Rock, in Multnomah County, State of Oregon, and am manager of the cannery for the Columbia River Packers' Association at that point. I have been such manager for about 12 years. I have followed the fishing business for

(Testimony of H. R. Reed.)

about 10 or 12 years, something like that, some set netting and gill netting. I have given these matters my consideration at that time, at least I thought I did, anyway. I have had experience in operating set nets and observing the manner of their operation, off and on for 10 years. I would not be positive as to the time. My experience has been confined to the upper Columbia River. The character of water necessary in which to operate a set net is what is known as an eddy. That is a dividing line, where the two currents come together, that is an eddy; the current on that division line would be where we would set out nets. These eddies are formed generally by a point or something projecting from the shore and thus forms an eddy. We get on the dividing line between the two currents. A gill net and a set net are identical so far as their construction is concerned, and the only way that a set net can catch fish is by gilling them, and they are only used that way, and are entirely dissimilar from a drag seine. In the operation of a set net, it ought to hang slack. If you put a strain on it, it won't fish, for when a strain is put on the net the net meshes will close together and it would be like a plank in water; fish would run against it but there would be no chance of them getting caught. If a fish were gilled in [543] a set net and the set net was in a swift current, they would pull the fish out. I have been on Sand Island, and I have examined the waters in front of Sand Island on the south shore. I would not con-

(Testimony of H. R. Reed.)

sider the beach in the form of a crescent; I would consider it a straight line.

Q. State in your opinion whether or not there is any point south of Sand Island suitable for set net purposes, or that a set net could be used there.

To this question, counsel for defendants objected on the ground that the witness has not shown himself competent.

A. It don't look favorable to me. There is altogether too much current there; no eddy that I could see. I was all along the island and in the waters in front of it, too. Set nets will only catch fish during muddy water, but not daytime, but at nights. It must either be dark or muddy water in order to catch fish in a set net. The seasons in which the Columbia River, that is the upper Columbia River, is clear is generally the latter parts of the season, in July—the latter part of July and August, and during that time a set net can be operated successfully in the night-time only.

Q. What, in your judgment, Mr. Reed, would be the value of the use of the waters in front of Sand Island on the south side, per annum, for set net purposes?

To this question, counsel for defendants objected for the reason that the witness has not shown himself to be competent to give an opinion.

A. Why, there is no value at all.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I am in the employ of the plaintiff company, and

(Testimony of H. R. Reed.)

manager of one of its canneries. The cannery is located at Rooster Rock, in Multnomah County, State of Oregon, a point that is called the upper [544] Columbia River. I do not know just exactly what they do consider the dividing line, I have always heard it called upper and lower river, and I don't know what the object is. I don't know where they quit calling it the upper river and call it the lower river; probably, the mouth of the Willamette, I am not sure. My fishing operations have been on the upper river. Sand Island is on the lower river. I would not say, but it may be possible that the upper river is so called because it is above the flow of tide water. For the last 12 years, my work has been in the cannery. Before that, I fished 10 or 12 years, off and on, but not steady. I was fishing for P. J. McGowan & Sons up in that country, both gill netting and seining, set net and wheel fishing, in fact all kinds of fishing. I do not remember how many set nets I operated. I must have set netted for four or five years steady. In my judgment, you must have an eddy for a set net, and that the mesh must hang slack in the water. I think most assuredly that the current will pull the fish out of the net if the net is drawn with the current, if the current is strong enough. Fish are not always traveling with the current. I have always understood they ran up and down. They do not go with the tide, although I don't know as to the tide water, I never fished there.

Q. If it is true that fish in the tide waters run

(Testimony of H. R. Reed.)

with the tide, and if the net is drawn by the action of the current and the fish are caught by their gills in the meshes of the net, why will not the action of the current drive the fish into the mesh rather than pull him out of it?

A. If they are traveling with the current?

Q. Yes, traveling the same way the net is drawn.

A. I don't know that the net is drawn that way. The tide is different from the current, I don't understand this tide business, the directions the fish run.
[545]

Q. The tide is a flowing of the water?

A. Yes, but I don't know which course the fish are following.

Q. Suppose they do follow with the flowing of the tide. If that is the method of running, and if the net is drawn with the current, and the fish as he goes is caught in the meshes of the net, then will not the force of the current drive him into it rather than pull him out of it?

A. It might have a tendency to drive him clear through or cut the meshes and let the fish out entirely.

Q. He would be tangled up in the net so he would not be likely to get out.

A. I never saw them tangled that bad, they generally break out. I never had any success set netting in swift current; I could not say as to the tide.

Q. How many times have you been on Sand Island?

(Testimony of H. R. Reed.)

A. Never on the island but once; passed there two or three times.

Q. When were you on the island?

A. About a week ago, I think.

Q. What day?

A. It was on Thursday, I believe.

Q. Thursday of last week?

A. Thursday of last week, I think that is the day; I would not be positive.

Q. I wish you would locate the day.

A. It was Friday.

Q. Friday, the 19th of April? A. Yes, sir.

Q. How did you happen to go there?

A. I went there with other parties, Mr. George was along. I went there for the purpose—

Q. Mr. who?

A. Mr. George. (Continuing:) —looking over the ground to see if I could find a suitable place for a set net. [546]

Q. Mr. George asked you to go? A. Certainly.

Q. What did you do when you got there?

A. We looked over the ground, looking for a suitable place for a net; I was not able to find one.

Q. What ground?

A. South side of Sand Island.

Q. Where were you standing when you looked it over? A. Along the beach, south side end.

Q. What time of the day were you there?

A. We left Astoria I think about eight o'clock in the morning, if I remember, and I imagine it must

(Testimony of H. R. Reed.)

have took about an hour to run over there, and we left there—

Q. You think you got there about nine o'clock?

A. I imagine so.

Q. What time did you leave?

A. It must have been about twelve, maybe one, half past twelve probably.

Q. You were there about three hours then?

A. Yes, something like that, maybe a little over three hours.

Q. What was the condition of the tide?

A. The tide?

Q. Yes.

A. It was coming in when we were on the shore.

Q. Coming in when you first got there?

A. No, the tide was out then. We were in the launch running along the shore, in the launch. When we got on the shore the tide was coming in.

Q. You went down in a launch in the first place?

A. Yes, sir.

Q. Where did you start in with the launch?

A. Started in at Astoria. [547]

Q. I mean the launch when you went down the shore.

A. Started in at the head of the island.

Q. East end? A. Yes, sir, east end.

Q. You went clear to the east end, did you?

A. Yes, sir.

Q. How far south did you go?

A. Went clear down as far as I wanted to go, down as far as the breakers. I don't know what place they

(Testimony of H. R. Reed.)

call it, below the "Republic" wreck.

Q. You went down below that? A. Yes, sir.

Q. How near the shore were you?

A. Well, I don't know what the distance, we was four or five hundred feet, I should imagine, three hundred feet, it would vary.

Q. When going down or coming back?

A. Both.

Q. How far were you from the main current of the river? A. From the main current?

Q. Yes.

A. I thought we was in it, I don't know. It seems to me it was strong enough where we was.

Q. You do not know where the main channel of the river is?

A. I know where the big boats were running, away out, I don't know how far it was.

Q. How far were you from that?

A. I don't know how far it was, long ways to where the ships run.

Q. You went down the island there just as the tide was finishing its ebb, did you not—the last of the outgoing tide? A. Yes, I imagine so. [548]

Q. From what you saw there—have you ever studied the action of the tides there, or anywhere else?

A. No.

Q. You are entirely unfamiliar with tidal action?

A. Yes, sir.

Q. Then you do not know whether with the flood or the highest of the ebb tide, whether or not the waters would sweep around the upper end of Sand

(Testimony of H. R. Reed.)

Island, and out towards the main current or channel of the river. You do not know anything about that, do you? A. Sweep around the—

Q. Sweep around the end, around through Baker's Bay and around the end of the island and be thrown out to the current of the river in the center of the ship channel?

A. I didn't notice it was doing it that day.

Q. You saw the tide when last going out?

A. Yes, sir, and when coming in.

Q. When the water is coming with a great rush with the ebb of the tide, if it should rush around the end of the island and strike out diagonally towards the center or main channel of the river, and then be thrown back towards the shore of the river, you do not know anything about that?

A. I know I did not see anything like that when I was there during that time.

Q. If you had been there when the flood of the ebb tide, so to speak, was on, and if you had seen the water making that kind of course, and then bound back to the shore and then back again, wouldn't that have created an eddy or number of eddies over that surface between the main current and the shore?

A. I could not say it would.

Q. What would it have done?

A. Simply straight course from up the river alongside the island.

Q. What you saw was a straight course? [549]

A. Yes, sir.

Q. It was the last flood of the tide next to the shore?

(Testimony of H. R. Reed.)

A. I could not understand that there would be any difference between the first and the last.

Q. You do not think there would be any difference?

A. No, I could not say there was.

Q. So far as you know you think the last flood of the tide would be just as swift and strong as the last ebb?

A. Possibly not as swift, but I saw nothing much, the direction of the run of it.

Q. Wouldn't the great volume of water rushing around the end of the island—what would be the effect of that, would it immediately turn and run straight down the shore, or would it be pushed out across here?

A. I think it would run down the shore.

Q. You think it would swirl around and follow the shore? A. Yes, sir.

Q. So you think it would flow around the corner of the island with a great speed and that it would immediately turn and follow parallel with the shore?

A. That is my notion of that place.

Q. You say the shore of Sand Island is straight?

A. Yes, it looks straight to me, perfectly straight. There might have been a little bend over there on the east end, there was one little bend, if I remember right, small bend.

Q. Are there any little bays on the south side of the shore?

A. None that I could see; almost a straight beach.

Q. Now, if you were to draw a line from the easterly end of the shore, to the westerly end of the shore,

(Testimony of H. R. Reed.)

you would keep practically along the beach, would you, all the way down?

A. Excepting along a little bit of point that sticks out, I don't know just how far it was from the east end, but not a great distance; there is a small point extends out there. [550]

Q. You say there was no indentations—no crescent form to the south side of the island at all?

A. It didn't look so to me; might be a little crook in it, but nothing to amount to anything.

Q. That is the only time you were ever ashore?

A. That is the only time I was ever on the island.

Q. Now, you think that you saw no eddy there?

A. I know I saw none.

Q. You know that you saw none?

A. I saw no eddies.

Q. You are not able to say if you had sat there for twenty-four hours watching the action of the tide, whether you would have seen eddies or not?

A. I see no reason why I would; I never seen them. The tide would have run one way or the other and have run the same way—

Q. If you know nothing about the action of the tide, how do you know you would not have seen a change in the condition?

A. I never knew it to run crossways of the river; either runs up or down.

Q. You know something about the flowing of water, don't you? A. Yes, sir.

Q. Don't you know if the water strikes the shore in a certain way it may be wrecked and be thrown

(Testimony of H. R. Reed.)

back? A. In some places.

Q. How often does the tide ebb and flood?

A. Twice a day, I suppose.

Q. Twice in 24 hours?

A. I think so, I believe that is the idea.

Q. What do you know about that?

A. That is the way I understand it. I said I didn't know but very little about tides.

Q. You have never watched them? A. No, sir.
[551]

Q. That being tidal location, and this being tidal waters, and you never have operated in tide waters, and never have been there before except during the three hours that you were there on shore, do you now undertake as an expert to testify here that there is no eddy in those waters and never is?

A. I say I could not see any.

Q. You say you did not see any during those three hours?

A. I saw no eddy or any chance where I thought there could be an eddy.

Q. The water was comparatively quiet at that time?

A. That is for the tide running in and out?

Q. The water was comparatively quiet, wasn't it?

A. It was swift, it was coming in.

Q. What do you call swift?

A. I call anything you could not set net in, for instance running three or four miles an hour; I call that all swift water.

Q. That is, the water was running three or four

(Testimony of H. R. Reed.)

miles an hour? A. Yes, I think so.

Q. Right at the shores?

A. I would not say that.

Q. You stayed there until flood tide again?

A. Yes, sir.

Q. Did it run three or four miles an hour then?

A. I don't know, I imagine it was running that way.

Q. Now, wasn't there a time when there was practically no current either way?

A. A short time, possibly.

Q. Do you know?

A. Well, I have always understood there was a slight—

Q. You were there, weren't you, then?

A. I might not have noticed it exactly. It was not standing perfectly still, but I presume at one time it stands still a [552] few minutes.

Q. The truth is, Mr. Reed, you were taken over there by Mr. George, the president of the company that employs you? A. Yes, sir.

Q. For the purpose of looking at that situation in order to come here and testify?

A. I suppose so.

Q. They told you so, didn't they? A. Yes, sir.

Q. They told you that is what they wanted you to do? A. Yes, sir.

Q. They took you from the upper river, a man who never had any experience in tide waters, had never seen Sand Island before? A. Yes, sir.

Q. And asked you to go there and stand there for

(Testimony of H. R. Reed.)

three hours and then come here and give your opinion that a set net could not be operated there?

A. They wanted to know how that compared with set net locations I had seen.

Q. That is, on the upper river?

A. On the upper river; and if I could see any places that looked favorable for set net purposes.

Q. You could not see any?

A. No, sir, I could not.

Q. You were present with Mr. George during the time you were looking at it?

A. Some of the time.

Q. And you were with Mr. Reed also—who was the other man—Mr. Latourelle? A. Part of the time.

Q. That was your purpose there? A. Yes, sir.
[553]

Q. To look at it and see whether you could testify in your opinion that there would be no eddies there in which you could operate set nets? A. Yes, sir.

Q. Now, isn't it a fact, Mr. Reed, that you were looking at that matter largely through the eyes of your employer? A. No, sir.

Q. That is what you were there for, wasn't it?

A. What is that?

Q. You were there for that purpose?

A. I was there looking for it, through his instructions, to look over the ground, to see for myself, and I was not influenced by him or any other man.

Q. You were there at the request of your employer?

A. Certainly, it was at the request of him.

(Testimony of H. R. Reed.)

Q. You say a set net must be operated in muddy water?

A. Yes, or dark water—during the night is all right in clear water.

Q. What do you mean by dark water?

A. You could not operate a set net in daytime in clear water with any success.

Q. Do the fish see at night?

A. I don't know; I don't think they can see as well as they can in the daytime.

Q. You can catch them in clear water at night?

A. Yes, sir.

Q. What was the condition of the water in front of Sand Island as to being muddy or clear?

A. When I was there?

Q. Yes. A. It was muddy.

Q. Then it would be good water for a set net?

A. Yes, the water was all right. [554]

Q. Did it look as swift—you say you saw no eddies there?

A. Yes, I could not see any place for a set net; the water was all right so far as the clearness or muddiness was concerned.

Q. Now, to be perfectly fair, Mr. Reed, don't you think if you were to stay there for a period of 24 hours and watch that water during the whole 24 hours' period, or stay there for a week or a month, that you would be better able to tell the condition there than you are now?

A. No, I don't think that I would.

Q. You do not think you would? A. No, sir.

(Testimony of H. R. Reed.)

Q. You think three hours was enough?

A. I don't think the current or tide would run any different if I had stayed there for 20 years, that would run just the same there, up and down the river.

Q. If you were there for 20 years you would not know any more about it than you could watching it as the tide was going out and as it was coming in?

A. I know it would certainly run the same direction unless Sand Island changed or went away, because it would not run different.

Q. When were you fishing with the set nets of which you spoke?

A. In what is called Butler's eddy.

Q. When, I say.

A. Let's see, about '88, I think, or '89, somewhere around there; I don't remember just the time I started.

Q. What is your age? A. My age is 42.

Q. 1888 was 24 years ago?

A. Yes; I have been fishing ever since I was 11 years old.

Q. Where were those nets?

A. They were right there near McGowan's Cannery on the upper river, right near the cannery.

Q. In Washington or Oregon? [555]

A. No, the first net I ever fished was in Oregon when I was 11 or 12 years old.

Q. When did you quit fishing with set nets?

A. When?

Q. Yes. A. Along 1906, I think—'96.

(Testimony of H. R. Reed.)

Q. You were fishing in Oregon or Washington?

A. The last fishing I done was in Washington, set netting.

Q. 1896 was the last year you fished with set nets?

A. I think so.

Q. Sixteen years ago? A. Yes, sir.

Q. That was on the upper river? A. Yes, sir.

Q. And you never fished at any other time in tide water? A. No, sir.

(Witness excused.)

Mr. HADLEY.—We now move to strike out the testimony of this witness, and the former witness, the entire testimony, for the reason that they are both shown to have had no experience in fishing in tide waters, or in the operation of set nets in tide waters, and at such locations as this on Sand Island; that both are entirely unfamiliar with the action of tide waters, and therefore incompetent to give an opinion as to the conditions at Sand Island.

Mr. FULTON.—We resist that motion. If it prevails, we will insist that the testimony of all the witnesses called by the defendants in this case, who never operated in front of Sand Island, be also stricken out by the same logic. [556]

[Testimony of R. A. Hawkins, for Plaintiff.]

R. A. HAWKINS, a witness on behalf of plaintiff, after being first duly sworn, testified as follows:

(Interrogated by Mr. FULTON.)

I heard Mr. McGowan when he testified that the south side of Sand Island is in the shape of a crescent. This is not so. The shape is comparatively

(Testimony of R. A. Hawkins.)

shown on Exhibit "F." It is just like the lines as shown on that exhibit. The south shore is practically straight. This map, Defendants' Exhibit "F" shows practically the line of the shore as it is and has been for the last five or six years, something like that. I am familiar with Sand Island. I have known it for about 20 years—25 years; I am familiar with gill netting and set netting. Within my knowledge, there has never been a set net operated south of Sand Island. The character of water necessary in order to catch fish in set nets is, I should judge, you would have to have slack water, and the water would have to be muddy. Some years, the water in the Columbia River is clear from around the 25th of June and some years to the 1st of July, and from then to the 10th, as a rule. It differs according to the freshet in the Columbia River. From May 1st up until about the 25th of June, the waters in and around Sand Island are generally muddy, as a rule, and is best suited and adapted for set net fishing, if possible. In order to operate a set net successfully, you have to have practically still water, I should judge what little experience I have had. There is no point in front of Sites 2 and 3 where such condition exists. It is impossible to fish with a set net in that locality. I heard the testimony of Mr. McGowan when he gave his theory of the waters rushing in from Baker's Bay around, crossing the main ship channel of the Columbia River. The facts, as I understand them, are, namely: Well, the first of the flood comes, it [557] comes gradually, it comes right up that

(Testimony of R. A. Hawkins.)

beach, it gradually increases, flooding about,—I should judge, about an hour before high water. Then after high water she turns and roars out, comes right down the beach; it is impossible for us to seine on top of high water, or even half tide at certain times, because we lose our seines; they would be swept out to sea. The current on full tides runs stronger; on neap tides not so strong. Take the average speed of the current, it must go five or six miles an hour past Sand Island, and, in my opinion, a set net could not exist there at all. The corks would all either be under or your under line would be on top of the water if it was not rocked heavy enough down, and if it was rocked heavy enough down it would zigzag, and it would be impossible to gill any fish. It has been tried there by McGowan's men; they were there three or four days with one and could not catch a fish.

Now, in regard to Site No. 1, I consider it as good ground as there is on Sand Island, taking it different years—the average years. It is not a very large ground, that is, it is not a very large fishing place, but they fish it with small seines. I have had considerable experience there. Hanson and Olson had that ground in 1908, 1909 and 1910, and during those years there was one year there I think they put in 30 or 40 per cent more than No. 2 and 3 put in.

Q. In operating it did the operators use the ground of Sites 2 and 3?

A. Well, there is a little piece of No. 2 extends from the "Republic" down to No. 1, but I had con-

(Testimony of R. A. Hawkins.)

siderable experience there. We got Mr. Hanson and Olson, they wanted to give Mr. McGowan some of their fish one day and I would not stand for it, so I told them they could not fish that part of the ground if they were going to give their fish away. So he said, all right, he was going to do it, and he left own ground and fished his own ground, but he got just as many, if [558] not more; he shortened his seine, and I think he improved. So I went down and told Hanson there was no use of him and I having any racket; he could fish the ground and if he did not give us his fish he could not trespass on our grounds, use our force or scows, and we compromised. He said he did not care whether he fished our grounds or not, that he was doing just as well. That is the way that turned up. He started his seine from at Site No. 1, and landed them on Site No. 1, and he continued doing this for over a week, and during that time he did as well, if not a little better than he did before. He was very independent about it, didn't care whether he went back on No. 2 or not.

Q. Now, do you know how the catch of salmon with a set net on a given location compared with the drag seine on the same location, and where each could be used, where it is possible to use either one on the same location, how is the comparative catch?

A. There is none; there is no comparison.

Q. You heard Mr. McGowan state in his judgment set nets would catch about 70% of what—

A. They would not catch seven, they would not catch two per cent; in fact they would not catch

(Testimony of R. A. Hawkins.)

any fish, and Mr. McGowan knows it as well as anyone.

Q. Did you ever know of anyone operating a set net with the current? A. With the current?

Q. Yes. A. No, sir, I never heard of it before.

Q. What effect would the current of the river in front of Sand Island have on the set net if it were anchored with the current?

A. Well, it would—in my estimation it would put it just end on—it would close the meshes and take it right upstream. [559]

Q. In that condition would the net catch any fish?

A. Impossible.

Q. How about gill netters using that ground out there where these set nets were supposed to be?

A. They use it just the same as we do, turn-about.

Q. How many comes down the river?

A. Certain parts of the year they come whenever they see us catching a few fish, they come in there and watch us, and when we catch a ton of fish or so they come on the beach and throw their net on the boat and pull out.

Q. State whether or not in your judgment these buoys that Mr. McGowan and his employees placed on this ground could be maintained there any appreciable length of time.

Mr. HADLEY.—That is objected to as immaterial to the issue now being heard.

A. They could not be maintained at all. When we went over on the island the first year they put them in there, they were scattered for miles before

(Testimony of R. A. Hawkins.)

we got there. We were accused of taking them out, which was not so. The gill netters plied from one place to another, some way below the "Republic" and some way up to the west end of Sand Island where the gill netters had dragged them up.

Q. During the time the water is clear in the Columbia River, which you say occurs after June 25th, when do the gill netters generally operate, mostly?

A. They operate mostly night-time; that is, when the water is clear; they fish a good deal at night-time, but whenever there is any fish around they pick up one or two salmon, whether clear or not. They come in on Sand Island and they lay there inside the "Republic" by the hundreds, and just as soon as they get an opportunity and see a few fish, they run right in on the beach, they come and throw their net out [560] and drift up or down, according to the tide. There is a very few drift two hours after flood tide, because they have to stop, and we have to stop, on account of the tide, it is too strong a current. We very seldom fish for two or two and a half hours after flood tide. We very seldom fish on the first of the ebb. We have to wait two or three hours after the first of the ebb.

Q. You say the fishermen—the gill netters snagged the buoys McGowan put out?

A. Yes, they pulled them all over.

Q. Were there any objections made to them by fishermen? A. Yes, lots of them.

Mr. WELSH.—We object to that and move to strike it out as immaterial.

(Testimony of R. A. Hawkins.)

Mr. FULTON.—Q. Now, were you down on Sand Island at the time Mr. Latourelle and Mr. Reed were, who were witnesses here? A. Yes, sir.

Q. Did you notice the condition of the water and the current in front of Sand Island and that vicinity at the time they were there? A. Yes, sir.

Q. Is there any change in the current and conditions of the current of the waters in front thereof any time during the fishing season, than what it was at that time as to the current being different—the condition of the waters being favorable or unfavorable for set nets?

A. The only difference is on full moon tide and neap tide. On full moon tides the tide run—in fact, on full moon tides there is probably a week, around a week, in full moon tides, we don't catch fish enough to supply the camp; we have to quit fishing. We do not quit exactly, we go out and try to catch a few; lots of times we never catch a half a ton. [561]

Q. Assume, Mr. Hawkins, Mr. Latourelle should have stood on that beach for 24 hours, would the conditions in front there have changed from what it was during the time they were there?

A. No, sir, they could not have changed any, the tide just floods in and ebbs out, there is all there is to it.

Q. They would not have received any different information had they stayed there for 20 years?

A. No, sir.

Mr. WELSH.—I object to that as leading and calling for a conclusion.

(Testimony of R. A. Hawkins.)

Mr. FULTON.—I will withdraw that.

Q. State whether or not the conditions that then existed and were shown to the witnesses Latourelle and Reed would have changed any had they remained there over several or more tides?

Mr. WELSH.—That is objected to as leading and calling for a conclusion of the witness, and invading the province of the Court.

A. I think if they had stayed there until the first of the ebb that they would have went away disgusted entirely, because the first of the ebb comes down there pretty strong, right through there, and if they had waited an hour longer they would have seen a strong flood tide.

Q. Would there have been any more favorable conditions developed for the operation of the set nets?

Mr. WELSH.—Same objection.

A. No, I think not.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I live at Ilwaco; I am superintendent of the Columbia River Packers' Association on the Washington side. That comprises all the jurisdiction in my territory, all that is over there in the line of traps—superintendent of traps, seines, and gill nets. It covers all the territory in the State of Washington, in the lower [562] river, and includes Sand Island. I have been in the employ of plaintiff ever since '98. I have acted in the capacity of such superintendent ever since, and I have been frequently at Sand Island, and I say that Sand Island

(Testimony of R. A. Hawkins.)

is not a crescent shape, not that you can notice at all. There are no bays, not a sign of a bay, no curvature to the shore, not to amount to anything that you would notice. You can walk along the beach as far as you want to and see the tide going and coming, and just the same if you should look out 100 feet or 200 feet, no difference to me; I never saw any difference. The only set net I ever saw operated south of Sand Island was the one that McGowan had there. I saw it there. I do not know how long it was there, I should judge, a week or two weeks, somewheres around there, and I was there when he operated it. The reason I happened to be there was that I made it my business, and I went there to see what they were doing. I was there several times. The water is muddy there sometimes. It is not muddy most of the time. It is muddy most of the time; it clears up about the 25th of June, and from that to the 10th of July, and then to the 25th of June the water is sufficiently muddy for set net fishing. The fishing season opens on the 1st of May, and so far as the condition of the water as to being muddy or otherwise is concerned, it would be good from the 1st of May to the 25th of June. If set nets could be fished there, it would be about two months that a set net could be operated, and that would be at night-time after the 25th of June. I don't think a set net could fish at any time. I think if a set net could be operated there, the water would be all right for catching fish up to the 25th of June. The water would be clear, but it

(Testimony of R. A. Hawkins.)

would be too strong, but if it could be fished at night, the water would be suitable for that purpose. A set net cannot be operated in a tide like that. There should not be much tide; there should be slack water for a set net to fish. There is slack water at every tide, but only lasts a few minutes, when the tide is [563] slack. It don't stay slack very long down at the mouth of the river, especially the first of July when the freshets come. The period you call slack water would cover an hour and a half, something like that before it turns. I should judge you should have still water in order to operate a set net, not more than two miles an hour, something like that. An eddy is practically still, for the reason that the tide does not run there, and the tide goes up and where there is bays, or anywhere the water goes in and forms, and the tide goes by. An eddy is a whirling condition of the water, it passes by, goes straight by, and where the bay is inside, the force of the tide goes outside of it. I say that it is impossible to seine there at times, because of the condition of the tides. If a set net were anchored there it would not catch fish at such times as you are able to use drag seines. The current would be too strong. We can fish on strong tides, but cannot fish on the first of the ebb, or two hours after the first of the flood.

Q. During the time that you are fishing, why wouldn't a set net catch the fish?

A. There would be no set net there.

Q. Can't you anchor a net so it would stay?

(Testimony of R. A. Hawkins.)

A. You might rock it down, but there would be no way for the fish to go in, it would be impossible; the tide is so strong every mesh would be closed.

Q. You set the net diagonally with the current?

A. No, sir; if you set the net diagonally with the current it would not catch the fish; if you set it cross-wise with the current the tide there forces everything closed, just the same way as if you put it end down. Your cork line would go down and your lead line would come up; I have seen that tried lots of times.

Q. By anchoring it perpendicularly with the tide, why would it close? [564]

A. It is impossible to anchor a set net there and have the meshes square where the fish go in, where there is such a strong current.

Q. Fish can strike the mesh and be held without being entirely closed?

A. The mesh won't be square where the tide is, it is impossible. You cannot put a set net out there and have it square where you have a running tide.

Q. How many fish did those nets catch there? You were not about their catch, were you?

A. Yes, I was there all the time, practically every day.

Q. While Mr. McGowan's nets were out there?

A. When his nets were there?

Q. Yes.

A. I was not there but very little first. I was there a little. We had a net fishing our grounds, No.

(Testimony of R. A. Hawkins.)

3. I was not there much when McGowan was sein-ing.

Q. When his set nets were there?

A. Yes, I was around there.

Q. How much were you there?

A. I was there—oh, I must have been there three or four days.

Q. You say they did not catch any fish?

A. No, sir, according to the men that were running the net.

Q. You don't know yourself?

A. Yes, I asked if he caught any fish.

Q. Did you know yourself?

A. No, I never seen them take any.

Q. What time of the year were they there?

A. They were there somewheres in June.

Mr. WELSH.—Q. You never lifted the nets, did you? A. No, sir.

Mr. HADLEY.—Q. Was it the very beginning of the fishing season?

A. I don't think it was. [565]

Q. It was before the fish began to run?

A. I think they figured on getting there just a little before we did, but we were there as soon as we saw they were going to molest us; I think that was the proposition.

Q. The fact is there were very few fish running at that time?

A. I do not remember, I do not know whether any fish were running at all or not during that time.

Q. You do not know?

(Testimony of R. A. Hawkins.)

A. I cannot remember; might have been and might not have been.

Q. If the fish had been running there you would have been there, with a seine.

A. No, sir, the water was muddy and we cannot catch fish when the water is muddy.

Q. Why has muddy water anything to do with it?

A. When the fish hit the seine they turn around and go back to sea. It is then we gill net, or anything like that.

Q. If they see the gill net, why don't they turn around and go back to sea?

A. They cannot see the gill net when the water is muddy.

Q. Don't they see the drag seine?

A. No, sir, we have them pounded and just the minute they hit it they turn and go back to sea.

Q. Isn't the muddy water some difficulty for either net? A. No, it is different, we tend our nets.

Q. Can't you attend a set net?

A. Yes, but a set net won't catch fish in clear water.

Q. You set them at night?

A. Yes, because it is dark.

Q. If it catches them at night, then it must be valuable for catching fish even in clear water, isn't it?

A. No, sir, the set nets won't catch fish in clear water.

Q. Not even at night-time? [566]

A. Yes, it will catch fish in clear water in the

(Testimony of R. A. Hawkins.)

night-time, because it is dark, but it won't do it in the daytime.

Q. Why don't you answer the question?

A. I did.

Q. You said it would not do it?

A. I thought you said daytime?

Q. I said night-time.

A. Excuse me. I was on Sand Island with Mr. Reed and Mr. Latourelle last Friday. We were there a little longer than three hours. I think if they had stayed a little longer they would have seen a stronger current, but they would not have seen an eddy. It is impossible to see an eddy there. There is no eddy on the south side of Sand Island before the "Republic." I have never seen any, and I have lived there 20 years, nor any other man.

Q. Then, all these men who have testified that they have seen eddies, they have lied?

A. I don't know what they call an eddy.

Q. There must be a wide difference of understanding between you as to what is an eddy, or else somebody is mistaken? What is an eddy?

A. Well, an eddy is a place where the tide rushes by and forms about a point where it goes around a point, and in that point is what they call an eddy. There are very few eddies I ever saw that would extend more than 100 or 200 feet, because if it was the tide would gradually work in there.

Q. Doesn't the water rush around the upper part of the island?

A. No, sir, it goes right straight up.

(Testimony of R. A. Hawkins.)

Q. Straight up?

A. Why should it rush around, why should the tide back up around?

Q. With the ebb of the tide, how about it?

A. With the ebb of the tide divides it, besides at the head of the island one goes down Baker's Bay and the other comes down in [567] front of Sand Island.

Q. Then, there must be a strong current there, off of the south shore?

A. Yes, on the south side there is no water on the inside.

Q. That current is thrown out towards the center of the river?

A. No, sir, comes down past the island.

Q. Isn't the east end of the island diagonal to the general portion of the island?

A. No, sir, it is practically straight all the way down.

Q. Slopes to the southwesterly, doesn't it?

A. It runs pretty nearly east and west, very little difference there.

Q. The east end of the island, what direction does it run? A. The tide?

Q. I am talking about the end of the island. What the direction is, easterly shore of the island; what way does it run, east or west, north or south?

A. You mean the tide on the east end of the island?

Q. I mean the island itself. What course does the shore take?

A. It is practically east and west, I should judge.

(Testimony of R. A. Hawkins.)

Q. I asked you what direction the east end of the island runs—what direction does that shore take, does it take a north and south course?

A. No, it goes right out—it is right in line with the head of the island; probably goes out east.

Q. The east end of the island goes out east?

A. The tides go out from the east end.

Q. This island called Sand Island runs in a general direction from east to west, does it not, the long way of the island is from east to west? A. Yes, sir.

Q. The south shore runs practically from east to west? A. Yes, sir. [568]

Q. This island has an east end? A. Yes, sir.

Q. What direction does the shore of that east end take, does it run north and south?

Q. You go down to the Cove; there is a place they call Oklahoma.

Q. Where is that?

A. That is right across from Fort Canby, that is where it empties into Baker's Bay. The tide runs out at the east end from Baker's Bay.

Q. What is the shape of the east end of Sand Island?

A. It is practically north and south, pretty near.

Q. Now, that is what I have been trying for ten minutes to get you to say; but it does slope to the southwest? A. It slopes to the southwest?

Q. Yes?

A. I don't see how it could slope to the southwest.

Q. It slopes from the northeast to the southwest?

Mr. FULTON.—You mean, starting from the

(Testimony of R. A. Hawkins.)

southeasterly end, you mean it slopes to the north-west?

Mr. HADLEY.—From the northerly end slopes to the southwest.

A. There is not much slope; you walk down the island, and I can show you by the diagram.

Q. I am only judging by the maps I have seen.

A. Which way do you mean?

Q. The general direction of the east end of Sand Island is what?

A. Here is the east end (indicating on plat).

Q. What is your answer to the question?

A. The east end is just a little point here.

Q. It is practically a cape, then?

A. Yes, a small place, just gradually runs around this way.

Q. But what is the distance, would you say, across the shore of the east end of the island?

A. Oh, it is—right on the point I should judge two or three [569] hundred feet, 200 feet, something like that.

Q. At flood tide that point breaks the current?

A. Sir?

Q. At the ebb tide that point breaks the current?

A. Ebb tide comes right down past here and goes out, and it gradually goes down here a little (indicating) for about an hour, I should judge, or an hour and a half, then turns around and runs back out.

Q. This easterly end of the island breaks the current of the ebbing tide and divides in two parts.

A. Yes, practically.

(Testimony of R. A. Hawkins.)

Q. Now, where does the tide that breaks on the south go?

A. Why, it practically goes right down the island, the tide is so strong it don't affect it.

Q. Wouldn't the force on this end of the island throw the water out towards the current of the river?

A. Has no effect at all.

Q. Some goes straight down?

A. Some goes straight down. A man laying out a gill net comes way down there and comes right to the "Republic"; I have done it thousands of times; it goes right down the island.

Q. You say the only difference between the conditions as they existed on the day you were there with Reed and Latourelle is the difference between full moon and neap tides?

A. Yes, sir.

Q. What kind of tide was it that day?

A. That day I think it was probably—it was low water at—well, I should judge about half and half, it was not quite neap tide yet.

Q. What do you mean by neap tide?

A. When the tide don't run out, that is, on the bar when it don't—there is an eight feet tide and a nine feet tide, and a seven foot tide and a six foot tide, you see. A neap tide is only [570] a small tide, that would be a six foot tide, or a five foot tide.

Q. The full moon tide is a big tide?

A. Yes, nine feet—nine feet five.

Q. You say that was full moon tide that day?

A. No, sir, I did not.

Q. Have you any interest in those sites and those

(Testimony of R. A. Hawkins.)

grounds off Sand Island?

A. No, sir, I have none whatever.

Q. You have no prospective interest in the result of this litigation? A. Sir?

Q. You have no prospective interest in the result of this litigation?

A. No, sir, I haven't a bit of any kind.

Q. You are simply employed by the plaintiff and have no personal interest in these locations whatever? A. I didn't understand the first word.

Q. Employed?

A. Yes, I have been employed for years with them.

Q. You have no arrangement with the plaintiff by which you are to share in the result of this litigation? A. No, sir, never had.

Redirect Examination.

(By Mr. FULTON.)

Q. In answer to a question propounded to you by Judge Hadley you pointed on this map, Defendants' Exhibit "F," and said that gill nets put in the water here would run right down along the line; what do you mean by here (indicating)? Do you mean that a gill net placed in the water at the easterly end of Sand Island— A. They come right here— [571]

Q. Wait a minute. (Continuing.) Placed at the easterly end—over in front, that they would drift right straight along in front of the island?

A. They would come right out here—they would even come up to here (indicating).

Mr. WELSH.—Q. You mean the east end of the island?

(Testimony of R. A. Hawkins.)

A. Yes, sir. They throw the net out at the east end, their buoy probably in 25 feet or 30 feet of shore, maybe less than that, and they drift all the way down here.

Q. In front of the island? A. Yes, sir.

Q. About 25 feet from the shore?

A. Yes, sometimes they have to go in near, not to pick up one end and in order to keep from coming in.

Q. How often have you seen that done?

Mr. WELSH.—Objected to as immaterial.

A. Thousands of times while I was around there.

Recross-examination.

(By Mr. HADLEY.)

Q. How were they operating those boats that drifted down there; do they have drags for the boats? A. Drags?

Q. Yes, for the nets? A. Drags?

Q. Yes, I don't know what else to call it.

A. Do you mean, did they have a net?

Q. Something that dragged on the bottom?

A. All gill nets are leaded in order to keep the bottom lying down.

Q. If they are in this shallow water they would drift out in that way—

A. That water is not shallow there.

Q. Next to the shore?

A. Not very,—not so very; if they are in on the shore it is [572] shallow there, but it is not out at the outer end.

Q. Is it not true that these boats were drifting down there because they were wanting to fish in there

(Testimony of R. A. Hawkins.)

and they arranged what they called the "coyote" method of dragging them in there?

A. There is no coyote method up there whatever.

Q. Maybe you know it by some other method; that is the name Mr. McGowan gave me; I don't know. The fishermen do fish in that way?

A. The fisherman comes and throws his net out there whenever he wants to.

Q. You say the boats would drift down next to the shore?

A. Yes, sometimes they would be on the outer end of their net.

Q. Suppose they set them further out in the river, where would they drift?

A. They would gradually go down. It all depends on the current, whether strong tide, or the wind; the wind generally has a little to do with the tide.

Q. They would drift with the main current?

A. As a rule, yes.

Q. Anyway outside of this ground the set nets were on? A. It is right on the ground.

Q. These set net locations are right in the main current of the river?

A. The set net locations in the main current?

Q. Yes?

A. No, they are not in the main current; I don't think they were in the main current.

Q. These gill netters would drift towards the main channel?

(Testimony of R. A. Hawkins.)

A. They drift in the main channel and drift all over.

Q. Where is the main current and channel of the river at that point?

A. Well, there are practically two channels, one goes towards [573] Astoria and the other comes up this side.

Q. Which side? A. Abreast of Sand Island.

Q. Now, south of Sand Island, where is the main ship channel?

A. The main ship channel is quite a ways south of Sand Island.

Q. How far out?

A. Well, I see ships going by there—oh, outside of the length of the net; there are lots of times when they are going up to the mills.

Q. Give us your best guess.

A. Three hundred or two hundred and fifty fathoms.

Q. About 1,800 feet out? A. Yes, sir.

Q. Fifteen to eighteen hundred?

A. Yes, sir, plenty of water there for any ship.

Q. These gill netters if they set out in the river will naturally drift down that current?

A. Yes, sir, they drift right down.

I have heard what is known as the coyote method of gill netting. These are operated only in a shallow place on some mud flat. I never observed any fishermen indulging themselves in the coyote method in front of Sand Island. The set nets were in the main drift of the gill netters, practically right

(Testimony of R. A. Hawkins.)

in their drift. There are practically 3,000 gill nets on the lower Columbia River. This is right in the main drift. Of course, they have got other drifts, and got many of them, but they drift right over the ground where the outer buoys of Mr. McGowan's set nets were located.

Recross-examination.

(By Mr. HADLEY.)

Q. How is it that they drift there, as you state, before they drift into the channel?

A. The channel goes on out. [574]

Q. The channel does not reach to the shore?

A. Yes, the channel practically goes pretty well up to the shore,—not exactly the channel, it is water; the water—there is good water there all the way down.

Q. I understood you to locate the channel about 1,500 feet out from the shore.

A. That is where the ships go.

Q. That is not a strong current?

A. I don't think it is any stronger out there than it is 100 fathoms this side.

Q. Isn't it true that a current like that falls within certain boundaries and the water forms a sort of a bank and does not have the velocity of the center of the stream?

A. No, sir; I think about one of the strongest places is in between the "Republic" and where McGowan had his set net; I have been there with the launch and could not hold her there with anchors.

Q. Between the "Republic" and the shore?

(Testimony of R. A. Hawkins.)

A. That is where McGowan had his set nets.

Q. It set there all right, didn't it?

A. Yes, but we had to get up steam pretty quick, that is we got our engine going, we were afraid we were going into the breakers.

Q. The set nets sat there?

A. He never had a set net there; he had his buoys there. He only had one set net out that I ever knew of; that was way out at this end; he was afraid to go down on the other end.

Q. It was the buoys you refer to?

A. Yes, sir. I don't think he ever had a set net there that I saw. He had buoys.

Q. Did you verify the complaint in this case for the plaintiff?

Mr. FULTON.—I object to that as incompetent, irrelevant and [575] immaterial, and I instruct the witness not to answer unless he wants to, because it is a familiar rule of law that you cannot ask a witness concerning a writing unless you refer the writing to him.

Mr. HADLEY.—You may answer the question.

A. Do I have to answer that?

Mr. FULTON.—Not unless you want to.

A. I won't answer.

Mr. HADLEY.—Q. Didn't you swear when you brought this action and verified the complaint that the defendants were maintaining set nets on that location down there?

A. That I said set nets were there?

Q. Buoys and set nets?

(Testimony of R. A. Hawkins.)

Mr. FULTON.—I object to that question; the writing is the best evidence. A witness cannot be examined concerning a writing unless presented with the writing; it is unfair, and the Judge knows that.

Mr. HADLEY.—Q. You do not know whether the complaint in this case—then you do not know whether the complaint in this case alleges that the defendants were maintaining set nets there or not, do you? A. No, sir.

Mr. HADLEY.—That is all.

Redirect Examination.

(Interrogated by Mr. FULTON.)

Q. Did McGowan ever attach any web or set net to the two buoys?

A. I will answer that this way. I don't know whether McGowan—there was a man named Sankala had a piece of seining web, but it was about four fathom seining web, it was to a buoy, and below that was one piece of gill net, but I don't think it was 50 fathoms, no, I know it was not that, I think there was one hundred feet, and the two ends of the set nets were tied to [576] it, up and down stream; that is all they ever put out to my knowledge; I was around Baker's Bay there all the time.

Q. The two ends of the net were never fastened to any stationary object or anchored? A. No, sir.

Recross-examination.

(Interrogated by Mr. WELSH.)

Q. A few moments ago you testified that we did not catch any fish in our net.

(Testimony of R. A. Hawkins.)

A. According to your own testimony, your own men, yes, sir.

Q. And now you mean to maintain that we did not have any set nets there that would catch fish?

A. No, sir, I did not.

Q. Is that so?

A. I said there was one buoy up there with one piece of seine on it.

Q. That is all?

A. No, sir, there was one set net.

Q. No other set nets that were in before they were completed, fully completed?

A. Never saw one.

Q. Were you out there with the fellows who pulled up the buoys and destroyed the nets?

A. No, sir, I was not.

Q. You did not assist them in taking them up?

A. No, sir.

Q. You do not know then, for sure, excepting from hearsay?

A. I was there the day before, there was nothing there then.

Q. Did you examine each net?

A. I stood on the shore, and there was not anything there whatever.

Q. Then, is it any wonder they did not catch any fish?

A. The fishermen had taken all out to sea practically the day [577] before we got there.

Q. You mean to say that the fishermen were drifting at that season of the year?

(Testimony of R. A. Hawkins.)

A. Yes, took pretty nearly all of them out before we got there; I don't think we took out more than two or three, I don't think so.

Q. This was what time of the year?

A. In June.

Q. You mean to say there were thousands of fishermen drift netting at that time?

A. I didn't say there were thousands drifting.

Q. About how many men were using drift nets and drifting in that territory at that time?

A. Quite a few; the water was muddy.

Q. What do you mean by quite a few?

A. There must have been a hundred around there.

Q. You mean to say they had commenced and were drifting, and they used to drift there and get their nets caught in the buoys and pulled out our buoys; our fish nets?

A. Yes, sir; I didn't see the fish nets, just the buoys.

Q. The nets remained there; they didn't pull them out?

A. I didn't see them get on it; they only had one net there; I didn't see them get on them.

Q. Did you say we did not catch any fish?

A. That is what your men told me.

Q. Then you next say we had a net—how many fish nets did we have out there in the water?

A. I only saw one.

Q. You only saw one? A. Yes, sir.

Q. Then, is it any wonder we did not catch any fish?

(Testimony of R. A. Hawkins.)

A. If you cannot catch any with one, what can you catch with nine; [578] if you could not catch a fish with one you could not expect to do so with nine?

Q. Not when people were pulling them out.

A. We never touched them up to that time; the gill netters took them out before we got there.

Q. Didn't you testify in the prior hearing that you pulled them out as much as three times?

A. I will admit after fishing started. I think they put them in after we pulled them out once.

Q. At that time you testified you pulled them out something like three times?

A. I am not sure whether three or two or one time.

Q. When does the fishing season start?

A. The 1st of May—that was after we started, somewheres around the 1st of July.

Q. Then, will you swear that while our fish nets were in there that the fish were running in any quantities at all?

A. I told you I don't know anything about the fish running at that time, I cannot remember whether the fish were running thick or running at all.

Q. When you people went on the ground you saw our buoys there?

A. We saw one or two of them, I don't know how many.

Q. You knew they belonged to McGowan?

A. I thought they were McGowan's.

Q. You went right in there like highwaymen and proceeded to take them out?

(Testimony of R. A. Hawkins.)

A. No, sir, put our seine out, drifted down and caught them, they came ashore and were taken out that way.

Q. Simply paid no attention at all to the rights of these defendants?

A. We had to seine, what else could we do? [579]

[Testimony of E. Polson, for Plaintiff.]

E. POLSON, a witness called on behalf of the plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is E. Polson; I reside at Brookfield in Wahkiakum County, Washington. I have lived there since 1874. My business is operating set nets and gill nets and I have been doing that steadily for the last seventeen years. During that time I have operated both set nets and gill nets. I have been operating such appliances at a point below Jim Crow Point; that is about half a mile below the Brookfield cannery, and somewheres about twelve miles from Astoria. The tide flows there at all the times, and full moon and new moon we have about a nine foot tide there. I have been operating set nets there for the last seventeen years, making it my regular business. The best places that I have found any place is a regular eddy where the set net stands still, and there you can get fish; and if you go outside where there is a strong current—I have tried different ways—you cannot get nothing there, and that has been my experience for the last seventeen years. I am

(Testimony of E. Polson.)

acquainted with Sand Island on the Columbia River. I am not much acquainted there, but I have been down there. I have been there and around the island but I am not much acquainted with the depth of the water; I don't know that. I am acquainted with the waters on the south shore of Sand Island, and I know there is a strong tide there all the time, and I have seen the waters there and know set nets could not be worked there. You cannot put a set net out in the current, for you would never catch anything in it. The reason for this is that it must be the same there as up above where I am fishing. I can catch nothing in the strong [580] current, because there is too much strain on the net, and if you set the net up and down a little the meshes will close and no fish will get into it. I have tried that, too.

Q. Now, from your knowledge and experience in operating set nets on the Columbia River in the tidal waters thereof, during the last seventeen years, tell me what in your judgment would be a fair price to pay for the use of the waters in front of Sand Island for the sole purpose of operating a set net.

A. I could not tell you that, because they would not be worth a great deal, because the net wouldn't do much good there, you might catch a fish there on the turn of the two tides, on top of high water and on low slack, you might catch one or two fish there; that is all you would catch. What it is worth all the season I could not tell you.

Q. Is it worth anything?

(Testimony of E. Polson.)

A. It would not pay a man to attend to it.

(Witness continuing:)

To catch fish in set nets in the daytime you must have muddy water, and if you don't have muddy water you won't catch any in the daytime, but you will get them at night. Generally speaking, we have clear water in the Columbia River the latter part of July or the middle of July. We usually have clear water about that time. It commences to clear up and from then on to the end of the season we have practically clear water.

Q. What effect would the current have on the set net if it should be attached to two buoys, a set net say 75 fathoms in length, placed across the current in front of the south shore of Sand Island?

A. The current is too strong, the net will bind up too much, just the same as a board, and the fish won't go into it; if they do get into it the current will take them right out. [581]

(Witness continuing:)

Sand Island on the south shore is a straight island exactly where it comes down to the "Republic," there is a little bend there, but there is a tide coming each way, and if they call that an eddy I don't know, but I call it a tidal rip; the two meets and it goes down in here. There is no eddy but a tide rip, that is what it is. There are no eddies in front of the south shore of Sand Island. An eddy in which to operate a set net there must be some kind of a point from end of shore what sticks out, anything with some kind of a point what sticks out, and that forms

(Testimony of E. Polson.)

an eddy and makes back water, and that makes an eddy, but where we have a straight shore along anywhere it don't make any eddy. Where it forms a little bit of an eddy and sticks out there you can put a set net in and it will stand still; you will get fish, but outside of that you won't get fish, and you get outside you won't get nothing, but get your set net in the eddy and you will get fish; I tried it. These eddies are all downstream from the point of the land. The curve goes around and around and it forms a regular center in there and the water stands still. You can put a stick of wood there and it stays there for hours and never goes out for half a day unless the wind blows it out. You might put a few set nets in the water off from the shore of Sand Island there, but if you get anything you will be lucky. You can put a set net anywheres; if you get anything in it, that is the next thing. But in front of Sand Island it would be no good.

Cross-examination.

(Interrogated by Mr. HADLEY.)

Brookfield is about twelve miles from Astoria, and I guess it might be ten miles down to Sand Island, so far as my judgment. I have fished pretty nearly all the way down to Sand [582] Island; I haven't set net but have been drifting down for the last year. I used to fish down there with gill nets. My set net operations were at Jim Crow Point. Jim Crow Point is about half a mile below the cannery, and that is about twelve miles to Astoria, makes it about twenty-two miles from Sand Island. We have a tide

(Testimony of E. Polson.)

there every day. I have operated set nets during the last seventeen years, sometimes one, sometimes two and three, but no more than three, and I have caught many fish in set nets, according to how the fish run. Sometimes don't get many and sometimes get quite a few. They are not like gill nets, they set there and if the fish come it is all right. You catch fish in set nets in an eddy; you cannot catch them in strong current with a set net. The current is always too strong in the Columbia River up where I am, you cannot catch anything there. You want still water for set nets; the water is most always still in an eddy. I have been a good many times at Sand Island and come down the river in 1871. I have been at Chinook, I could not tell you how many times. I never fished on Sand Island. I was on Sand Island just a week ago, I think it was on Monday I went down there in a launch. I went down for the sailing—seeing how the water is and seeing if it amounted to anything down there. I went down there with Tom Nelson. I do not know what his occupation is and I do not know whether the boat I went down in belonged to the Columbia River Packers' Association. I do not know what he wanted me for, he told me to look around. I was very familiar with Sand Island and I went down there because I had nothing else to do. I had looked over the waters there lots of times before. I just went up and down in front of the shore of the island in a boat that day. I saw a tide rip in front of the "Republic." It is a little bit of a rip coming in all

(Testimony of E. Polson.)

directions but it could not create an eddy. There is only one tide rip there. We went pretty far inshore but did not go out towards the center of the [583] river. There might have been eddies further out between that and the main channel, but I did not see them, and there may have been a good many places there where there are eddies in which set nets would be placed further out in the river, but I did not see them. The Columbia River Packers' Association told me it wanted me to come here and testify for them. I was down there that day about half an hour. It was ebb tide, about an hour and a half or two hours before low water. When the water is muddy in one place in the river it is muddy all over, when there are freshets in the river, and that is true of the whole river. When the water is muddy down at Sand Island it is also muddy away up above. There is a little bay in front of Sand Island down towards the wreck of the "Republic," just a little bend there, not a regular bay, just a little bend. It looked to me like a hundred feet or more. I think it ran a hundred feet or more back in the island and about a quarter of a mile on the shore. The tide comes down in front of the island pretty strong; it comes down straight, I watched it that day. I have never watched it before and that was the only time that I ever saw it. I was never there the first of the ebb.

[Testimony of H. M. Lorntsen, for Plaintiff.]

H. M. LORNTSEN, a witness in behalf of the plaintiff, after being first duly sworn, in answer to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. FULTON.)

My name is H. M. Lorntsen; I live in Astoria, Oregon; I have lived there since 1889, and began fishing on the Columbia River in 1887. Gill net fishing is the only kind of fishing I have followed. Most of my fishing was from the head of Sand Island down to the mouth of the river. I am familiar with Sand [584] Island; I am down there every season, more or less, and have been down there ever since '89. I am secretary of the Columbia River Fishermen's Protective Union, also agent of the Alaska Fishermen's Union. The Columbia River Fishermen's Union is an organization of Columbia River gill net fishermen. I have observed the shore of Sand Island during that time and I am familiar with the character of the ground in front of it. I have fished there lots of times and seen others fish there. I do not think the south shore of Sand Island is of a crescent shape; it is about as straight as any shore line can be. I should judge there are at least fifteen hundred boats engaged in gill net fishing on the Columbia River, and have been for the last several years, and that number I think are generally operating in July operating from July to the end of the season. I know where the main drift of these gill netters are. There is one drift commencing from the Government dock

(Testimony of H. M. Lorntsen.)

from Fort Columbia dock. They lay out from somewhere up around that dock and drift down. This dock is on the Washington shore. The nets work more and more, sometimes striking land along Sand Island; other boats take them further away. That is one drift. The others commence to fish from the upper end of Sand Island—what they call coyote; they lay out half a net and pick up and go down again. Then, further down the island, about half way, is another place they commence to lay out and drift down. Those who lay out their nets from Fort Columbia, the current will take them down along the island, it just depends upon the tide—but if not, they go outside of the “Republic”; but as a rule they generally pick up when they drop over the head of Sand Island, they pick up their nets because they won’t make any drift along the island; but sometimes they let the net go if they expect to get slack water down by the “Republic,” because the principal thing is to keep the net in slack water. That is one of the main drifts in the [585] river and has been ever since I have been on the river.

Q. I will ask you to state in your judgment whether or not it is possible to maintain set nets in front of Sand Island, say along 50 to 100 fathoms from the shore.

To this question counsel for the defendants objected upon the ground that the witness has not shown himself to be competent; that he has not had any experience in set netting.

A. Positively no show for any set nets along the

(Testimony of H. M. Lorntsen.)

island, for the reason gill nets are drifting up and down the island. The current will always take the nets higher up or down, except at slack water. The gill nets would get snagged on the moorings of the set nets, and the result would be there would be no set nets, because they have no legal right there. It is a place for the people to use their right of fishery in common.

Mr. HADLEY.—We object to the witness stating what he understands the law to be; it is entirely immaterial to any issue in this case.

Mr. WELSH.—The Court having decided we had the prior and exclusive right to fish there with our set nets; it is not for you to say. We ask to have the above answer of the witness stricken out.

(Witness continuing:)

When the gill nets come along they simply get snagged and tear up the nets, that is so far as the gill nets. Another thing, there never could be any fish caught on Sand Island beach along there in set nets, because it is not a place for set nets; the current is sweeping up and down there. Now, a set net never [586] works to any advantage where the current is sweeping up and down, especially where there is such a strong current as on Sand Island; you could not get a set net to stay there, and even if you could make it strong enough to stay, you could not catch any fish in it.

Mr. WALSH.—I move to strike all of the testimony of this witness. In the first place, on the ground that the witness has not shown that he has

(Testimony of H. M. Lorntsen.)

had any experience with set nets, and for the second reason because he is giving an opinion involving the law, and all that sort of thing. No foundation laid; it is immaterial.

Mr. FULTON.—Q. You say that set nets will not catch fish. Just state why you know that, and what experience and observations you have made in regard to the manner of operating set nets.

A. I have had no experience with set nets, but I had experience with my nets getting on snags, and other men whose nets have got on snags. My experience has been that it turns up and down along the current; the current is going to tear the fish out if there is any in it, and that would place it in such shape that no fish would get in it because it pulls the meshes together.

(Witness continuing:)

Gill nets and set nets are identical so far as their construction is concerned, and anyone that is operating a gill net knows in what condition the net will gill fish.

Before they commenced to construct the jetty on the Columbia River we had to drift on the Oregon side over a certain drift in front of Fort Stevens. We used half a net in that drift; as soon as we got through the drift we got good fish; we could see the fish taking the net. But if we left the net until it swung around, we would have no fish. I fished with Jens Nelson. We were green over there, and someone told us how to fish, and we were going to do it according to instructions. We lay out the [587]

(Testimony of H. M. Lorntsen.)

net and the fish was kicking, and of course Nelson wanted to get all the fish he could get; but when we got to the fish he gave it a swing and we didn't get one fish; they all tore out. We went over the ripple square and the net swung with the current, and the force of the current along the end tore the fish out. Same thing with a set net. I have seen lots of men get snagged and have seen some of the gills of the fish left. You can see the gills; very seldom the fish stay in. Accidents will happen that the fish get tangled up in the net and it will stay; but most of the time they drop out.

Q. I wish you would describe the current in front of Sand Island, whether it is straight up and down, or how.

A. According to the tide; if it is running out it goes down along the island; if it comes up, it comes up along the island. Along the island the tide in shore stays about the same tide as the tide table, but outside it may run out a couple or three hours longer. But there is a time when the tide comes in, the tide rip comes in between the two tides and strikes the beach first. Sometimes the men lose their net, not lose it, but get tangled up. Drifts come in that tide rip, and nothing can stand it. If a set net were set out across that tide rip, there would be no set net left. This tide rip carries a lot of rubbish, consisting of trees and roots and all such stuff, large and small of all kinds. When the time of the freshet comes this rip is more or less caused with the first of the freshet; more stuff coming down in there.

(Testimony of H. M. Lorntsen.)

There are always more or less logs and roots floating around.

There are no eddies in front of the south shore of Sand Island.

Q. Mr. McGowan stated that there was quite a heavy current running around the easterly end, the head of Sand Island, [588] at certain stages of the tide, which ran even out into the main current of the river, and where it met the current coming up from the south side, it formed an eddy up there?

A. That is not an eddy, it is a tide rip; it lasts probably an hour and it is over. That is not an eddy, it is a tide rip.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I fished from 1887 to 1899 and since that time I have done no fishing. All of my fishing was on the Columbia River, and most of it was done from the head of Sand Island down to the mouth of the river. I have been secretary of the Columbia River Fishermen's Protective Union since 1899 in the spring. I am also agent for the Alaska Fishermen's Union, and secretary and treasurer of the United Fishermen of the Pacific Coast. The headquarters of the Columbia River Fishermen's Association is at Astoria, and the headquarters of the Alaska Fishermen's Union at San Francisco, and the headquarters of the other organization is at Astoria, Oregon. These organizations keep me pretty busy, and my business keeps me in the office with correspondence,

(Testimony of H. M. Lorntsen.)

and also by going about from place to place.

Q. The last fourteen years then, you have not had an opportunity to study and observe the use of fishing apparatus, have you?

A. Yes, sir, I have, as a practical fisherman, I have. I have an opportunity to study that every season, because I was fishing before I went into this place, and it was my business to attend to the work of those men and I am on the river every season. If anything is wrong I am asked to investigate and find out and see what it is.

(Witness continuing:)

To enlighten your mind a little bit—maybe you won't [589] care for it, but anyhow, the Columbia River Fishermen's Union, their principal work that I do, and where I come in contact with things outside of the office is during the fishing season. During that season I have nothing to do with the Alaska fishermen, I have gotten through with them, they have left. Now I take up the work of the Columbia River Fishermen's Protective Union and I attend to that exclusively, so I have plenty of time to attend to the business of the Columbia River. Then in the fall, after I am through with the Columbia River business, the fishermen come back from Alaska and I attend to that. Just my special time I attend to the other fishermen's business. But the fishermen are doing the fishing, they are operating the gear and I do not help them.

Q. You do not believe in fixed fishing appliances, do you?

(Testimony of H. M. Lorntsen.)

A. Not absolutely, not where they interfere with the common rights of fishery.

Q. You are opposed to such a thing?

A. Where they interfere with the common rights of fishery.

Q. You are opposed to traps?

A. Certainly, traps are opposed to the fishing industry.

Q. You started to pull out a trap once, didn't you?

A. Yes, I succeeded.

Q. Didn't the sheriff pull you?

A. Not that I know of.

Q. Didn't the sheriff tell you, the sheriff of Clatsop County, tell you he would shoot you?

A. When did that happen?

Q. Did it ever happen? A. Not to me.

Q. You never heard of that?

A. I never heard any sheriff say he would shoot me.

Q. Didn't you have an organization for the purpose of going [590] up and pulling up a regular trap?

A. Some years ago I hired a crew to go up around Browns Park and pull out a trap.

Q. That was the case; you didn't pull out any traps?

A. It was because the trap had no legal right there.

Q. You do not think that any trap has a legal right?

A. Not where it interferes with the common right of fishery.

(Testimony of H. M. Lorntsen.)

Q. You do not believe any trap—

A. Where it don't ever interfere.

Q. You do not believe in set net—

A. What I mean by the common right of fishery is where the currents can be used, one for another; everyone has the same right to the current.

Q. Well, your theory is, there should be no fishing except by gill net?

A. Except where they interfere with the common right of fishery.

Q. How can you fish—can you fish anyway, except by the common right of fishery?

A. Not necessarily.

Mr. FULTON.—I insist that if these gentlemen want to discuss these questions they hire a special hall. I further object to this line of questioning as taking up the time of the Court.

Mr. WELSH.—We insist that the defendants have a right to interrogate the witness along this line for the reason this witness is opposed to all fixed fishing appliances, for the reason he has taken the law in his own hands, and hired men to go and take out and tear up fixed appliances where they were lawfully located and licensed, and for the reason it shows a motive for his testimony.

Mr. FULTON.—I insist a man has a right to take the law in his [591] own hands to abate a nuisance where it interferes and deprives him of a legal right.

Mr. HADLEY.—Counsel wants to argue to the Court that a man has the right to violate the laws, but we are not arguing it here.

Mr. FULTON.—We simply exercise this right because you gentlemen are exercising it through this case.

[Testimony of T. K. Johnson, for Plaintiff.]

T. K. JOHNSON, a witness produced on behalf of the plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is T. K. Johnson and I live on Tenasillhee Island in the Columbia River in the State of Oregon. Tenasillhee Island is about thirty-four miles or thirty-six miles from the mouth of the Columbia River. Probably about thirty miles from the upper end of the island. Sand Island, I should judge, is about three miles long, probably four. I am seventy-two years of age; I have lived on the Columbia River thirty-six years and during that time I have been engaged in gill netting, seining, trapping and set netting. I gill netted on the bar and then I commenced seining on Tenasillhee Island. I have also been engaged in the business of set netting on my place at Tenasillhee. The tide at Tenasillhee is about one-half as strong as it is around the head of Sand Island, and it is not as high as it is at Sand Island. If it is a nine foot tide at Sand Island we will get a raise of between six and seven feet at Tenasillhee, and the tide ebbs and flows there during normal conditions, but not when there is a [592] freshet in the river. During heavy freshets the current runs downstream all the time. I gill netted in

(Testimony of T. K. Johnson.)

and around Sand Island from 1876 to 1883. In 1907 I gill netted down at Sand Island, that is, in front of said island. I have been familiar with Sand Island for the past thirty-six years and I am also acquainted with the south shore of Sand Island. I didn't see any crescent shape on the south shore of Sand Island. The water line looks straight and at high water it makes kind of a little small waves where there are some low places. You see on the flood when the water comes in it strikes the low land first, or the low water, the rip tide, it is always straight. The south shore of Sand Island is not a bay. I have experimented in operating set nets on the Columbia River two or three years but did not make anything out of it. I have also observed other people operating set nets. I know the character of the water in which to operate set nets and it requires an eddy, and the kind of an eddy has got to be on the upper side where the current fixes it. It must be below a point that sticks out and the eddy is formed below. The under-current whirls back and forth and makes an eddy, and there must be a considerable projection of land out in the water so that as the current comes up and runs around it backs up on the other side, and the set net is placed in between the two currents. A set net cannot catch fish in running water where there is any current to amount to anything. I have tried it on my place on spare places I didn't use. At Tenasillhee I have two miles of beach. My beach is not straight, it has a bend or curve in it. I do not have as swift a current at my place as there is at Sand

(Testimony of T. K. Johnson.)

Island. I have tried to operate a set net in front of my island but it would not catch any fish. I tried it a number of times; I would set the net quarterly to the tide to prevent it drifting down, but the pressure of the water where it catches the [593] nets, it sets them down, you have a slack for the net. When that slack comes down it closes the meshes. I never tried to operate a set net with the current. I don't see what a man wants to set a net that way. In my experience we won't catch any fish. The current naturally closes the meshes.

Q. Is there any eddy or any place at any point on the south shore of Sand Island where a set net could be operated to catch fish?

To this question counsel for the defendants objected on the ground that it was leading.

A. I don't see where. Not to my knowledge, I don't know of any.

(Witness continuing:)

There are no eddies there. There are spots where there is comparatively slack water, but it is the only places where it floods; it is where the tide commences to come in on Sand Island down there by the "Republic," it commences to flood strong on the shore, but the current outside of that runs strong, and when the tide is running strong all the time there is no place making an eddy. As I said before, to form an eddy it has to be opposite against a running current and beach, where it is bound to make an eddy below, but from the "Republic" when it comes like that on a straight beach, that cannot make an eddy,

(Testimony of T. K. Johnson.)

because the tide runs down anyway. That beach there from the west side instead of being on the east side. If there was an east side of the point it would make an eddy, but on the west side it cannot make an eddy, because it comes down on the ebb tide and sweeps along. I have the same place at my place when there is a big freshet. When the current comes down it sweeps it right along and you cannot take it in. [594]

Q. State whether or not in your judgment and experience and knowledge as a fisherman whether or not a set net could be operated at any point south of Sand Island in the waters of the river.

A. Not to my knowledge.

Q. What in your judgment would be the value of the right to operate set nets or a set net there?

A. In my judgment a man cannot run a set net on Sand Island up in the front. In the first place the current don't have any opportunity for setting the net, and second, the fishermen are right there; that is, fishermen engaged in coyote fishing on the up tide of the island.

Here counsel for the defendants moved to strike out the foregoing answer and testimony of the witness, on the ground that the Court has held that defendants had the prior and exclusive right to fish there, and it is not for this witness to say that we had no right to maintain our nets there.

(Witness continuing:)

The fishermen would snag the set nets. One thing, set nets could not stay there for the current, and sec-

(Testimony of T. K. Johnson.)

only, the fishermen would not let them stay there. The fishermen would hang up on the buoys.

Mr. FULTON.—Q. Now, suppose you could operate a set net in front of Sand Island, how would the catch compare with a seine, seining?

A. With a seine?

Q. Yes, how would the catch, under existing conditions, compare with the amount of fish that can be caught with a seine under the same conditions?

A. Where are you going to set your net? [595]

Q. Supposing there was a good eddy there and that you could set eight set nets out there, and you could seine there at the same time; now, which could catch the most fish, providing set nets could be maintained there and could catch fish; what in your judgment would catch the most fish, set nets or seines?

A. Of course the seine would catch the fish.

Q. What would be the comparison in your judgment of the catch? How many more fish would the seine catch?

A. The seine might catch ten or fifteen tons of fish and the set net would catch five or six.

Q. Suppose the set nets were a success there and suppose they would catch all the fish that an ordinary set net would catch, how would the catch of a set net compare with that of a seine under those favorable conditions—say under those favorable conditions for a set net, how does its catch compare with that of a seine?

A. I don't care how good the set net would be you would catch probably on the tide 24 or 25 fish or

(Testimony of T. K. Johnson.)

more—twenty, while the seine would catch five or six tons of fish a day.

Q. That is about the comparison in your judgment between the catch of a set net and a seine?

A. Yes, I don't see any—the seine would go out twelve or fifteen hundred feet or two thousand feet and sweep the river, so it gets the fish; a set net sets 100 feet from the shore, what is it going to catch?

Q. Mr. McGowan testified that a set net about 75 fathoms long would catch about 70% as many fish as a seine would catch?

A. A set net 70 or 75 fathoms?

Q. Yes. [596]

A. I don't know where he would get about 75 fathoms set net on Sand Island.

Q. Yes. A. He may do it.

Q. In your judgment, could a 75 fathom set net be operated in front of Sand Island?

A. No, nor thirty feet; I don't see where.

Cross-examination.

(Interrogated by Mr. HADLEY.)

I live at Tenasillhee Island and have lived there a good many years and I fish there all the time. This is about thirty miles above Sand Island. I am between Skamokawa and Cathlamet. A nine foot tide at the mouth of the river from Sand Island would be between six and seven feet at my place. You see, it drops off two feet, I believe, in twenty miles. I have fished at Sand Island a good many years ago and I also fished there in 1907, during the month of July and a part of August. I was gill netting dur-

(Testimony of T. K. Johnson.)

ing that time. I was there four weeks, I believe, and I fished from Sand Island down and so on. I start with my drift from the upper end of Sand Island and drift down to the inside and kept off the "Republic" wreck, and from there I would drift down, I would drift right along and keep wherever we can hold our nets. I said that Sand Island is practically straight on the south side at low water and at high water there is some break in the shore. You understand the meaning. You see the sand in some places is low, and naturally when the water comes there the low water fills them up. Of course after the island is filled up with high water it is straightened off. When the high water comes up and meets the high part of the island it cuts it off. I said there has never been an eddy on the south shore of the island, that is, you can't see an eddy [597] there, because there is no projection to make an eddy.

Q. You say you cannot catch fish in a set net in a current? A. No, sir.

Q. You don't mean that absolutely; you mean you can catch them in a mild current, can you?

A. I have a mild current, milder than any in the river, and I cannot. When the current strikes the set net when you anchor the net it is bound to reverse the meshes and when the meshes are reversed it is impossible for the fish to get into it.

Q. You say you set your net quarterly with the current up there?

A. To give me a chance to face the eddy. The friction will set the net in proper position, and then

(Testimony of T. K. Johnson.)

we have to lift the net up. You want slack water to have the net set.

Q. Why don't you set your net across the current?

A. The net will fish across the current, you understand, by quarterly. Now, this is the shore (indicating), we set the net like this (indicating); drop the anchor and slack on the rope—

Q. You mean when you set it quarterly you set it about an angle of ninety degrees with the current?

A. Not like that.

Q. Something like that. Can you set it square across the current, perpendicular?

A. That makes it worse, if there is a running current.

Q. The fish would not be as likely to be driven out by the current as if set quarterly; it would keep driving the fish in it if it is set square across the current.

A. You know quarterly means up the river, not down the river.

Q. You mean down the river quarterly from the way the current is going?

A. We are supposed to have slack water there on this point. [598] We just drop the net and fish out here and drop the buoy and have slack line enough to take the fish out. If that is slack line it naturally brings the net across. We kept them in the same position on either side.

Q. Well, you think that the set net cannot be operated in front of Sand Island for one reason, because the gill net fishermen would be in the way?

A. Not exactly that; there is no position. If the

(Testimony of T. K. Johnson.)

water was in an eddy there—an eddy, cannot get any eddy to fish. If there was no place for a set net, fish with the seine.

Q. Do you understand that if this is the defendants' ground that the gill netters would not operate there? A. Inside the eddy?

Q. In that territory there.

A. If the eddy catches the gill net he swings the gill net around. Anything that will hold a net on the shore where it is drifting, the strong current will swing it ashore.

Q. One reason why you think a set net could not be operated there is because the gill netters would be there in the way?

A. That is one reason; it is no place for it, and the current would not allow a net to stay there and fish. I never heard of a man setting a net in a strong current, I don't care who the man is, he cannot catch fish.

Q. Now, you speak of the comparative catch of a set net and a drag seine where they are operated in the same kind of water and the conditions are the same. I understood you to say that where a gill net might catch 24 or 25 fish that a drag seine might catch five or six tons? A. Yes, sir.

Q. You mean in a single day?

A. Twenty-four hours. [599]

Q. You would not expect a drag seine to get five or six tons every 24 hours, would you?

A. A seine will fish in clear water, which a set net cannot fish.

(Testimony of T. K. Johnson.)

Q. A set net fishes all the 24 hours?

A. No, he fishes any time there is muddy water.

Q. A set net is there to fish 24 hours?

A. It is in the water, but he don't catch a fish.

Q. Drag seines only operate a few hours of the day.

A. He operates until the tide turns and quits; if the water was muddy a seine don't fish because it don't catch any fish, neither does a trap catch any fish.

Q. A set net will catch in the night-time, whether it is muddy or not?

A. A set net will catch in the night-time, a trap don't.

Q. You find it to be that way?

A. I find it this way. A trap will catch the same fish a set net can fish.

Q. You had in mind a single trap. Now, if you could operate a great number of set nets in front of Sand Island there, they would catch a good many more fish than one, wouldn't they; isn't that true?

A. No.

Q. Wouldn't a good many set nets catch more than a single one?

A. Well, if you will lay set nets over the island, all around it, you might probably catch half a ton of fish a day or night-time; I don't think a set net will catch any. If a set net sets night-time and catches any fish—if he don't catch any, there is nothing to get. [600]

[Testimony of T. M. Nelson, for Plaintiff.]

T. M. NELSON, a witness on behalf of the plaintiff, after being first duly sworn, testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. FULTON.)

My name is T. M. Nelson. I reside at Astoria, Oregon. I have lived in Astoria off and on for nearly thirty years. I am forty-eight years of age; I am by occupation a fisherman and cannery man on the Columbia River. I have had experience with both gill nets and set nets; I have had experience in set netting just one full season, but I have watched others operating set nets and understand how they are operated, and I know the character of the water and the kind of places necessary to operate them in order to catch any fish. I obtained this knowledge chiefly from my own experience that I had on the Cowlitz River and from observations that I have made on others, particularly around Brookfield. There has never been any set netting to amount to anything in the Columbia River below what is known as Tongue Point that I ever saw, on either the Oregon side or the Washington side. I am acquainted with Sand Island in the Columbia River and have been acquainted with it for about fourteen or fifteen years steady, consecutively, year after year, but there has been about eleven or twelve years since I have been actively in fishing. Two years ago I saw Sand Island about two or three times a week during the fishing season, and since that time I have been on the island three or four times. I am acquainted with

(Testimony of T. M. Nelson.)

the current in front of the south shore of this island. These currents run as follows: With the ebb tide they are running straight down, and with the flood they are running about straight up; of course it would vary at different stages of the tide, conditions of the moon, as to new and full moon; that is as to speed. I am [601] also acquainted with the south shore line of Sand Island. I should say it would be pretty straight, or almost straight, from the upper end and down to the "Republic" and from the "Republic" a little ways below the "Republic," it seems to sort of sheer off a little towards—I would say in a north-west course. In order to operate a set net I should have all the way from three and a half, on up, fathoms of water, and be set in still water so that the meshes of it would stand open and would not close with the current, or float. There is no such place in front of the south shore of Sand Island, and in my judgment a set net could not be operated in the waters south of the south shore of Sand Island, for the reason that there is absolutely no place to set it. You cannot string out a set net and make it go, say, on an angle of even 45 degrees with the current and hold it there, and if you were to place it up and down the stream, the net would simply draw together like a rope and the fish would not gill in it. In muddy water when set nets should be doing their best, that would lay a plank and act more as a lead, because the fish would not lead them, would back away from them; and in clear water of course a fish could see it and would not go near it; it would be as a lead.

(Testimony of T. M. Nelson.)

Q. What in your judgment would be the fair value of the use of the south shore of Sand Island, say in front of Sites 2 and 3, for set net purposes?

A. No value, for the reason I could not catch enough fish in a set net to feed myself.

(Witness continuing:)

There are no eddies in front of the south shore of Sand Island. There are certain tide rips there; these tide rips are not stationary and they vary with the stages of the river. When the river is high and we have a good freshet the tide rip does not show up very prominent, but when the river [602] begins to flood and the water recedes, the tide rips begin to show up somewheres around about low water tide, and somewheres about an hour before, and it works its way in towards the island until it meets the current coming off the flats, the flats below, and spends itself. There are no swirls in the waters of Sand Island or along the beach of Sand Island, that could be termed a swirl. I have seen swirls coming in off what they commonly call Peacock Spit, with the flood tide on full or new moon, but never saw them along the river. I have never seen them close along the island.

I know where the gill netters drift in the waters of the Columbia River. I suspect there are three or four hundred men fishing along Sand Island; some of them start in at the head of the island and lay out a piece of net; others lay in half way down; others will go two-thirds down, and in this way, one after the other, wherever it suits him, or wherever

(Testimony of T. M. Nelson.)

his particular fishing grounds lie, he will lay out a piece of net, say one hundred fathoms, or one hundred and fifty fathoms, maybe his whole net, and these will float parallel to Sand Island. They will float sometimes out to the amount of the net a man has out and also due to the state of the tide he is fishing; lay out when the tide runs strong and lay out fifty or sixty fathoms, and he will hug the island pretty close.

I know where the buoys were that Mr. McGowan placed in the waters in front of Sand Island in 1908. These were in the drift of the gill netters. In my judgment it is not possible to maintain buoys for the purpose of anchoring set nets there and not avoid contact with drift nets and place the net in a position to do work. These drift nets would get foul with these anchors and probably drag them out.

[603]

Cross-examination.

(Interrogated by Mr. HADLEY.)

I have not been engaged in fishing for the last eleven or twelve years. I was actively engaged in fishing for about eighteen years; all along the Columbia River, and about fifteen years at Sand Island. I operated a set one year and during the rest of the time a drift net. I did principally all my fishing in the neighborhood of Sand Island, both above and below, and drifted in front of Sand Island almost every day that I was actively engaged in gill net fishing. I quit about twelve years ago that would be in 1900. I have never seen set nets operated on Sand

(Testimony of T. M. Nelson.)

Island. I know where Government Sites 1, 2 and 3 are on Sand Island and the set net locations claimed by the defendants in this action in front of Sites 2 and 3. I think the south shore of Sand Island is what you might call straight. I would say straight until some distance below the "Republic"; that would be two or three hundred feet, some such a matter. The shore goes off in a sort of northerly direction, and there are no indentations along the shore that I would call indentations; no little bays. The only curvature in the shore is one little spot you might call a curvature. I could not say what causes these tide rips, they are in the river, but they are not caused in any way by the shape of the shore line, and are not always caused by the meeting of two tidal currents, but that is the cause at times. A tide rip doesn't always show itself at the shore line. It is sometimes in the middle of the river and works in. It seems that my observations have been that when the freshet leaves the river the current sets north—the ebb tide currents set north, and as long as it runs the rip practically runs with it, and at the final conclusion of the ebb tide ceasing to run, it spends itself near the shore line, or at the shore line. The rip is not made by the current sweeping out from the shore line, it works the opposite way, and is not always [604] created where two currents come together after running in different directions, but currents so meeting would have a tendency to make a rip or swirl of some kind.

Q. I hand you a photograph which is marked De-

(Testimony of T. M. Nelson.)

pendants' Exhibit 2, which has been heretofore introduced in evidence in this case at the former hearing, which purports to be a photograph of the south shore of Sand Island, and ask you to examine it (handing photograph to witness). Now, if that is a correct photograph of the south shore line of Sand Island and if this represents the eastern end of the island, and you are looking at the west, and this represents the western end of that island—

A. Wait a minute, you say that is the east end? (Indicating.)

Q. If this is the east end of the island, and you are out here in a boat, for instance, looking down that way (indicating), and if this further projection which extends further out beyond that is the western end of the island, and these other projections are a part of the shore of the island, then you are mistaken about that being a straight shore line?

A. If this is a true photograph. Is it? You say this is the east end, and that is the west end (indicating)?

Q. That is the way I understand it. Of course, I didn't take the photograph, I assume that the camera told the truth. But, if this is a true photograph representing and picturing the shore line of that island on the south, and if this is the east end and that the west end, and these projections between are part of the shore line, then that is not a straight shore line?

A. No, that is not a straight shore line. What is this supposed to be and represented to be from this

(Testimony of T. M. Nelson.)

point here to here (indicating) ?

Q. As I understand, this is the eastern end of the island. This [605] is the shadow or line, here, and the camera must have been placed to the east end of that looking to the west, taking in the shore line on the south of the island. Those further projections, extending furtherest up being the west end of the island, these intermediate projections being other projections from the shore. Now, if that is a picture of the shore line of the island, it is far from being a straight shore, isn't it?

A. Why, sure, it is far from being a straight shore.

Q. Now, if this is a correct representation of that shore line, I will ask you if the ebb tide coming to the westward, where it strikes the eastern end of this island, would not be deflected out into the center of the river by the force of the impact against this end of the island; would it not throw the water out in this way to the southward to the center of the river, south-westerly? A. It does not.

Q. Wouldn't it, if that was the shape of the island?

A. If that is the shape of the island it would be that way.

Q. Then when it strikes the strong current in the center of the river it would throw it back towards the island again? A. No.

Q. Wouldn't that be a physical fact?

A. No, no; it would depend somewhat, when it lies below here, to how the flats and spits and things are situated below the end of it.

Q. If it strikes the current out here it would have

(Testimony of T. M. Nelson.)

A. I would not set the net, but I would drift with it.

(Witness continuing:)

I have fished with drift nets in Baker's Bay and caught fish there, years ago. This ground is now taken up practically with traps and gill netters do not go in there now. I don't know how it is around the cape, but they do drift around the south of the island.

Q. You say you drift along pretty close to the shore, or just as it suits you. You mean by that, if you want to drift close to shore you direct your boat that way to get it there?

A. No, I would not do that.

Q. What do you mean; you say you drift inshore, or out, as it suits you? [608]

A. The tide might be as the opportunity presented itself for me to put out my net, then I would always get a chance to put it out the way I wanted it.

Q. You put it out a certain way and figure on drifting a certain course? A. Yes, I do that.

Q. If you want to drift inshore you fix it so it will drift inshore? A. Yes, sir.

Q. Ordinarily, you drift outside, drift the main channel of the river? A. No, sir, no.

Q. Now, it is your theory, that a set net must be set in still water in order to fish successfully?

A. Yes, sir.

Q. Now, not having operated a set net but one season, are you prepared to say that your opinion on that subject is conclusive, or of any value?

(Testimony of T. M. Nelson.)

A. Yes, sir.

Q. Where did you operate that one season?

A. On the Cowlitz River.

Q. On the Cowlitz River? A. Yes, sir.

Q. That is on the Washington side?

A. That is on the Washington side, yes, sir.

Q. How far were you from the mouth of the river?

A. Why, I think about a mile.

Q. A mile? A. Yes, sir, about a mile.

Q. The Cowlitz has a very swift current, hasn't it?

A. Yes, when there is a freshet the current is pretty swift.

Q. You had no moderate currents on that river?

[609]

A. We had two spots where there was a moderate current.

Q. How did you find a place to operate a set net at all on that river?

A. There was a small stream called the Coweman, and it confluences with the Cowlitz River, makes two small eddies.

Q. There was where you operated?

A. We operated two nets in them little eddies.

Q. Did anybody else operate set nets on the Cowlitz River? A. They did further up.

Q. Did they operate in the current?

A. I don't know what they operated on.

Q. You do not know where they were?

A. No, sir.

Q. Now, have you never heard of set nets being operated anywhere in a current? A. No, sir.

(Testimony of T. M. Nelson.)

Q. You do not know that has been done successfully, do you?

A. We tried it on the Cowlitz; our own experience there was to try it.

Q. It happened that you did not succeed, but you do not know that others have not succeeded, do you?

A. I know of none that has tried it and not succeeded; I have in a way tried it myself on the Columbia River and did not succeed, but it was in a way where I was doing it to catch the fish for home use and not for commercial purposes.

(Witness continuing:)

Peacock Spit is south of Sand Island some considerable distance below the west end. I should say the upper end of it would probably be a couple of miles distant west therefrom—west of the “Republic” wreck. There is a period at slack water time when the current is not strong south of Sand Island, and if [610] a set net was across the river at that time of day it could catch fish if they were out at that moment of slack tide, if they were setting there and had gone through the period of strong tide they would be so jumbled together they could not catch any fish, and they could not so set without jumbling together; you could not put anything on them to hold them; they could not be anchored so they would not tangle together. The same theory would hold good on a short net as on a long one, only not quite so much. Set across the current, a short net, say four or five fathoms long, it would have a better chance

(Testimony of T. M. Nelson.)

than one fifteen or twenty or thirty or more fathoms long.

The place where I operated set nets on the Cowlitz River was affected by the tides. There is quite a little flood there. I was located at the confluence of the Coweman and that is as far as I went up.

Redirect Examination.

(Interrogated by Mr. FULTON.)

The period of slack water off the south shore of Sand Island in that vicinity, I should say lasts from five minutes to twenty minutes, and during that period if set nets were put in there, the length of ten or fifteen fathoms, you might, perhaps, catch some fish, if any fish happened around at that time—there at that very time, and laid in shape. But you would have to take the fish out immediately, otherwise the tide would carry them out. The strong ebb tide would bury the net under water and the fish would tear out. It would only take a few minutes to lay out a set net there, if you had everything ready, but it would require two men to do it, but if a net were set out there in slack water it would hold there just as long as the slack period lasted, which would be five to twenty minutes, and the [611] fish would have to be taken right out; if not, they would be lost.

[Testimony of R. A. Hawkins, for Plaintiff
(Recalled).]

R. A. HAWKINS, a witness heretofore produced on behalf of the plaintiff, was recalled and testified in response to interrogatories propounded to him by respective counsel, as follows:

(Testimony of R. A. Hawkins.)

(Interrogated by Mr. FULTON.)

I heard the testimony of Mr. McGowan describing the Brumbach location of Sand Island. I am acquainted with the Brumbach location. I was over there off and on; about as familiar then as I am now. I know reasonably—pretty close to the extent of his location. I think he, Mr. McGowan, purchased from Brumbach—he bought two or three mules and two or three old seines and a little piece of ground there; I would not think it would exceed 1,800 feet. Brumbach's outfit was practically a hand seine. He used to pull in his head line with one horse, one mule. I do not think his seine was over 50 or 60 fathoms, maybe 70, in length. Stensman never had any fishing gear there.

The mesh of gill nets are about nine and one-fourth inches. The gill nets catch, as a rule, fish from about twelve pounds up.

During the years 1908, 1909 and 1910, the plaintiff operated on Sites 2 and 3. The proportion of the catch of salmon on those grounds was substantially twenty to twenty-five per cent under twelve pounds. The size of the seine meshes were from three and a half to five inches. I know of my own knowledge that the plaintiff, taking the three years together—1908, 1909 and 1910, when it operated these Sites 2 and 3, broke just about even. I do not think it made any money. [612]

Cross-examination.

(Interrogated by Mr. HADLEY.)

The meshes of a gill net are nine and one-fourth

(Testimony of R. A. Hawkins.)

inches. They knit it on a mesh board—they put it on a mesh board and they measure nine and one-fourth inches, that will go around the mesh board; that will make it square. It is not exactly square. It is about what you might call diamond shape, the meshes draw out to a diamond shape, but not an exact diamond shape, but something like that. The meshes of a drag net are about three and a half to five inches.

During 1908 the plaintiff caught on the sites in question somewhere around 150 tons of fish, and in 1909 we caught 104 tons, I think, somewhere around there. In 1910 we caught about 135 tons, somewhere around there, and I think with that catch the plaintiff just about broke even. I could not tell you the amount of fish the plaintiff caught on the two grounds during the year 1911, because the plaintiff fished Site No. 1 with Sites 2 and 3. All three grounds were fished together. 1911 was a little better year than the previous years. In my judgment it was considerably better. We employed about fifty-five men in the operation of our drag seines there, somewhere around there, during the whole season. We also had launches and horses. The expense of operating a drag seine is considerable. I should say that the expense of operating the drag seines there during each of those years was about \$220 a day, something like that. I do not know what would be the operating expenses of set nets there. I don't know how extensive they would go at it. They would have a whole lot of expense if they tried to keep them in. The ordinary operation of set nets

(Testimony of R. A. Hawkins.)

entails comparatively small expense where they are set in eddies. It doesn't take much to get them there. The entire catch of salmon by the Columbia River Packers' Association in front of the three sites for the year 1911 was [613] about 390 tons, I think; somewhere around there.

Redirect Examination.

(Interrogated by Mr. FULTON.)

I know what the catch of salmon fish in front of Site No. 1 was in 1908. I think it was 55 tons, something like that. In 1909 it was close to 40 tons, and in 1910 it was 154 tons.

Recross-examination.

(Interrogated by Mr. HADLEY.)

The Columbia River Packers' Association did not operate seines in front of Site No. 1 in 1908, 1909, or 1910. We never had any particular arrangements with the operators there. I just let them put their nets out in front of Site No. 2. There is no other way of fishing in front of Site No. 1. They are required to place their seine out in front of Site No. 2 and then make the landing on Site No. 1.

Q. Then, isn't it true that the fish you say were caught on Site No. 1 actually were taken from in front of Site No. 2?

A. No, he didn't have a chance to fish No. 2; No. 2 was 3500 feet long.

Q. He set his net in front of it?

A. He did not fish it; he fished No. 1.

Q. Didn't he drag No. 2.

(Testimony of R. A. Hawkins.)

A. He drags No. 1; sets his net in front of No. 2 and drags No. 1.

Q. If he sets in front of 2 he must drag No. 2?

A. He didn't go up on No. 2, fishes down on No. 1.

Q. If he sets in front of 2 and lands on No. 1, he must drag on No. 2? [614]

A. I gave him the privilege of fishing above the "Republic."

Q. There are fish there?

A. There are fish there; there are fish all over the ground.

Q. He drags a seine in front of No. 2 and he caught the fish that were there?

A. He drags his seine over No. 1, and can drag his fish on No. 2.

Q. If he set his seine in front of Site No. 2 and then dragged it down so as to land on Site No. 1, wasn't he getting fish in front of No. 2; he was simply dragging his fish out on the shore of No. 1?

A. He had no ground to fish on No. 2, practically. The "Republic" is there and he cannot get up on No. 2.

Q. How far above the west line of No. 2 did he set his seines?

A. He would go up on No. 2 three or four hundred feet, and half of the time never got on No. 2 at all. He had short seines and did not bother it.

Q. If he went three or four hundred feet above the west line of No. 2, he dragged down, and where did he land on No. 1?

A. He landed down on No. 1.

(Testimony of R. A. Hawkins.)

Q. How near the east line of No. 1?

A. He would go quite a ways down, he would go away down as far as the breakers would let him go.

Q. How far would that be?

A. That would be eight or nine hundred feet, or a thousand or fifteen hundred feet.

Q. Did he customarily land that far around on the east line of No. 1?

A. Pretty near all the time, yes, sir.

Q. Then, when you estimate the number of fish that were caught in front of Site No. 1, you were counting on the fish that were taken by the drags where the dragging was made on No. 2? [615]

A. I don't know what fish he caught on No. 2; he could not catch any on No. 2, hardly.

Q. Isn't that true, you were counting the fish that were landed on Site No. 1?

A. How do you mean?

Q. In making this estimate of the catch for those years, you are counting the number of fish that were landed on Site No. 1?

A. Why, sure, those fish—that is, they were caught on No. 1 ground, never caught on No. 2, because we fished No. 2.

Q. You say they were caught on No. 1 because they were landed on No. 1?

A. They were all landed on No. 1, but he fished his No. 1.

Q. How could that part be, when you fished on No. 1, you actually dragged in your net on front of No. 2?

(Testimony of R. A. Hawkins.)

A. You have to lay out in front of somebody's ground.

Q. Now, the truth is, he must have caught some fish in front of No. 2?

A. Probably he did get a few fish in front of No. 2, could not get many; we had a little experience; I stopped them for over a week from fishing, and he done just as well, if not better with his short seine.

Q. What is the width of Site No. 2?

A. Thirty-five hundred feet.

Redirect Examination.

(Interrogated by Mr. FULTON.)

The plaintiff operated Site No. 1 during the year 1911 under a lease from the Government.

Mr. FULTON.—We have the lease. I would like to ask that the lease go in evidence with the privilege of substituting a copy. [616]

Mr. WELSH.—The lease from the Government commencing the year 1911?

Mr. FULTON.—Yes.

Mr. WELSH.—All right.

Stipulation [As to Leasing of Sites Nos. 1, 2 and 3].

It is agreed between the parties hereto that the United States, through its War Department, on the 28th day of March, 1911, leased to the Columbia River Packers' Association, for the term of three years, commencing on the 1st day of May, 1911, and terminating on the 30th day of October, 1914, Sites Nos. 1, 2 and 3, accordingly as marked and delineated on the map offered in evidence before the Master, marked Defendants' Exhibit "F," and is properly

described on said Exhibit "F." The lease is practically a copy of the said original lease which the plaintiff offered in evidence heretofore.

Thereupon, the plaintiff rested.

The defendants for their rebuttal then called the following witnesses:

**[Testimony of H. S. McGowan, for Defendants
(Recalled in Rebuttal).]**

H. S. McGOWAN, a witness on behalf of the defendants, was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

I heard the testimony with reference to the fact that set nets could not be operated in anything but eddies or still waters. The fact is, an eddy is not necessary for set nets, you can operate them anywhere you feel so disposed. I know of places where they are operated and they are not in an eddy. I have [617] particularly in mind North River on the Willapa Harbor, where I have been quite familiar with the method of fishing. It is a river where the tide ebbs and flows and its average rise and fall is about the same as it is on the Columbia River. Set nets are successfully operated for the purpose of catching salmon fish in the North River. They are operated there in all kinds of water, in tide water and even further up stream, what they call the low high water. The tide, however, is not extensive, but further down the river they operated a great many of them in tide waters where they had each day an ebb and flood, the same as it is on the lower Columbia River, and they are fished successfully and salmon

(Testimony of H. S. McGowan.)

fish are caught therein.

Q. You heard Mr. Hawkins testify that Stensman owned no fishing location on the south shore of Sand Island or the waters south of Sand Island. You can tell us the facts with reference to that.

Mr. FULTON.—I object to that as not proper rebuttal. In fact, I don't think anything you have offered here is rebuttal testimony. It is part of your original case. I move to strike out all the testimony of Mr. McGowan on the ground it is not rebuttal evidence.

A. Stensman did own a fishing right. I don't remember just how long they had their rights there, but they had them there in running for about 1904 and 1905, I should say up to 1908, I believe. Mr. Reischman, or Reischman Brothers, owned fishing rights down there from about 1903 or 1904, I should say, until 1905, or thereabouts. These grounds were close to the Brumbach grounds just westerly of the "Republic" wreck and extending on downward to the ground now covered by Site No. 1.

Q. You succeeded to the interest in the locations of Brumbach, Reischman Brothers and Stensman, is that correct? [618]

To this question counsel for the plaintiff objected upon the ground that it was incompetent.

A. Yes, sir.

Cross-examination.

(Interrogated by Mr. FULTON.)

Brumbach had a seine—called it a seining ground. He had a fishery right there upon which he operated

(Testimony of H. S. McGowan.)

drag seines. He located it, that is the way the fishermen term it. He located a fishery there that no one else was using at the time he took out a license there and operated. He took out his license in Washington, and entered into the possession of this fishery and claimed it and also exercised the right and fished there. His right as I understand it, existed in fishing, taking up and establishing the location—taking out a license for that place and then operating there, seining. That is all that I know he had. I don't know how he located, I didn't ask him. I was not there when he located it. He located it and took me and showed me where the delineations of his line ran that he had located. He showed me where the lines crossed in the water and showed me the marks that he had on the shore that he went by. This was upon Sand Island and on land owned by the Government, and the Court says that it is in the State of Oregon. It was not known at that time to belong to the State of Oregon. It was a long time before it was established. Of course Brumbach had a license issued by the State of Washington, because he supposed he was in Washington, and he went over there and located it and operated this fishery. It was subsequently determined that the territory was in Oregon. I bought all the right that Brumbach had there. What I have said in regard to Brumbach's rights pertains both to Reischman and Stensman. I presume they acquired their rights the [619] same way.

(Testimony of H. S. McGowan.)

Redirect Examination.

(Interrogated by Mr. WELSH.)

I don't know whether the plaintiff in the complaint filed herein made any allegation as to where Sand Island was, but they alleged the locality in controversy to be in the State of Washington, as I remember. Up to the time the United States Supreme Court in the case entitled "State of Washington vs. the State of Oregon" decided that Sand Island and the *locus in quo* was situated in the State of Oregon, Sand Island was believed to be by the public in general in the State of Washington, and the Oregon authorities recognized Washington licenses when being operated in the waters of the Columbia River south of Sand Island. At all times up to the decision of the United States Supreme Court in the case above mentioned, people generally, in fact everybody, believed this location to be in the State of Washington.

**[Testimony of Ralph Grable, for Defendants
(Recalled in Rebuttal).]**

RALPH GRABLE, a witness on behalf of the defendants was recalled and testified in response to interrogatories propounded to him, as follows:

(Interrogated by Mr. WELSH.)

Q. Mr. Grable, there is some testimony here that in order to operate a set net for the purpose of catching salmon fish that it is necessary to put it in eddy waters—quiet waters. Tell us the facts with reference to that.

Mr. FULTON.—I object to that as not proper rebuttal testimony. [620]

(Testimony of Ralph Grable.)

A. Why, I will explain, as my experience in fishing set nets I never have fished a set net in an eddy; that is considered by a fisherman that an eddy is the best place to fish a set net. I never have fished a set net in that condition.

I would say that an eddy was the best place, but in my experience in fishing, I have fished in straight current, with the set net standing straight up and down the current.

Q. With what result?

A. With the best results.

Q. What in your opinion, from your knowledge and experience as a fisherman—from your knowledge as a fisherman and the experience you have had as a fisherman, state whether or not it is necessary to have set nets placed in eddy waters in order to successfully catch fish?

Mr. FULTON.—We object to that.

A. No, sir, we don't prefer that kind of water at all. If we have a ground where the fish run we prefer to set our nets lengthwise in the current, no matter how strong, there is always slack water in any river in the world between high and low tide; and when slack water comes the fish run to and from the shore. They don't run up and down the river. In my estimation they run simply across and hunt for the deep water, for the fish is here and there; he runs backwards and forwards, not up and down as some people suppose they do; he runs backwards and forwards. Suppose the river ran east and west—suppose the river ran east and west, when slack water

(Testimony of Ralph Grable.)

comes a salmon is going to go north and south, from one shore to the other until he finds the current. That is my estimation of the fish.

(Witness continuing:)

I have operated set nets in the Nasel River. I fish [621] there every winter with set nets. That is my winter business, setting nets on the Nasel River, and the water where I have my set nets is very swift water, I would say, and I have had what I call success, because I made a living out of it, and I suppose that is a successful business. My nets caught fish and they were successfully operated in very swift water.

Thereupon, this witness prepared a map which was offered in evidence before the Master and marked Defendants' Exhibit "G," and is hereunto attached and so marked, which is a correct map of Sand Island, that the different points thereon indicated.

Q. What effect does the shape of the southern shore of the island have upon the creation or non-creation of eddies and eddy waters?

To this question counsel for the plaintiff objected upon the ground that it was not proper rebuttal; the witness having been examined on this point in his original examination.

A. Why, when the current is so strong between any point in any river wherever I have been, wherever there was a by-way formed by two different points, that the current slackened between these two points. I will go in this by-way in order to get out of a strong

(Testimony of Ralph Grable.)

current, wouldn't I? That is my experience.

(Witness continuing:)

For twenty-five years I have fished on the Columbia River and when I want to go against the current I will go as near Sand Island as possible, because I want to get out of the current; it is a strong eddy between those two points. The south end of Sand Island and the north end of Sand Island is pretty [622] near it, but here we have the eastern and western end of Sand Island.

Cross-examination.

(Interrogated by Mr. FULTON.)

Q. How many drinks have you had this afternoon?

A. (Witness hesitates.)

Mr. WELSH.—If you had any, tell him.

A. I had a glass of water, but not a drink of whiskey.

(Witness continuing:)

I drank no liquors to-day at all. I am perfectly sober. I had a drink before breakfast this morning but haven't had any since. I had a glass of water. I have probably had two glasses of beer to-day since breakfast, but no more.

**[Testimony of Amon Markham, for Defendants
(Recalled in Rebuttal).]**

AMON MARKHAM, a witness heretofore produced on behalf of the defendants, was recalled and in answer to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. WELSH.)

I certainly have had a great deal of experience in

(Testimony of Amon Markham.)

operating set nets in the waters of the Nasel River. The Nasel River is a tidal stream where the tide ebbs and flows and has a very strong current.

Q. You may state *where* or not it is absolutely necessary for the successful operation of set nets, to have them in eddy waters?

To this question counsel for the plaintiff objected upon the ground that it was not proper rebuttal.
[623—625]

A. Why, I have operated set nets from start to finish in the Nasel River, all in the current, and they can be successfully operated there.

(Here witness was handed Defendants' Exhibit "G" and was asked whether or not that was the correct representation of the southern shore and general appearance of Sand Island.)

A. Why, it is a very good map, only he has not included the fact that this is narrow here.

(Witness continuing:)

I know it is practically correct because it shows the southern shore to be of crescent shape. I would say that map was a very good map of the southern shore of the island, but the little point at the east end of the island should be narrow. I have seen this island many times during the last thirty-four years. I was raised and born right there, you might say. I was deputy sheriff of Pacific County at one time.

Cross-examination.

(By Mr. FULTON.)

Nasel River does not flow into the Columbia River, it flows into Willapa Harbor, about twenty-eight

(Testimony of Amon Markham.)

miles from the Columbia River. I fished for myself and owned the set net myself.

Q. What was your biggest catch per season ever made in a set net on the Nasel River?

A. That is a question I could not answer.

Q. Did you ever catch over a ton?

A. I should say I could.

Q. Did you ever catch a ton?

A. Not at one time.

Q. I mean in one season. A. Why, sure.

Q. How much did you ever catch, your best season's catch, with a set net on the Nasel River?

[626]

A. Well, now, I would have to go back and hunt up my receipts to find out exactly.

Q. I don't ask you exactly.

Mr. WELSH.—Q. Tell the best you can remember.

A. Why, in the neighborhood of four tons. I am not going to go until I get my receipts.

Q. How long ago was that? A. Two years ago.

Q. That you got four tons? A. Yes, sir.

Q. How many set nets did it take to catch four tons?

A. We operated about three, I think, once.

Q. Out of three set nets on the Nasel River two years ago you secured four tons of fish?

A. Yes, sir.

Q. That is the best you ever did?

A. Well, now, do you want me to go to work and exemplify the fish we did catch?

(Testimony of Amon Markham.)

Q. Answer the question. A. Four tons.

Q. That is the best you ever did? A. Yes, sir.

Q. That was in the Nasel River?

A. In the Nasel River.

Q. How did you lay out your nets?

A. That is our business.

Mr. WELSH.—You can tell him, Mr. Markham.

A. We put them on the sticks.

Mr. FULTON.—Q. How much whiskey have you been drinking?

A. Not as much as you have, in all probability.

Q. About how many drinks did you take to-day?

A. I had a drink of whiskey this morning. [627]

Q. Did you say you had a drink with me this morning? A. No, sir.

Q. You had a drink of whiskey this morning?

A. Yes, sir.

Q. How many drinks have you had?

A. One drink of whiskey.

Q. What have you been drinking?

A. Nothing at all.

Q. Haven't been drinking any intoxicating liquors?

A. Not on your life. I had a drink of whiskey this morning before I went to breakfast.

(Witness continuing:)

We put out set nets in the river on sticks across the current. We also fished with the current. We had two different ways. Two of our nets were set across the current, and one was set up and down with the current. The fishing was done all in the night-

(Testimony of Amon Markham.)

time. We took the fish out at any tide, either high tide or low tide.

Redirect Examination.

(Interrogated by Mr. WELSH.)

The set nets that we operated on the Nasel River were from twenty-two to twenty-eight fathoms in length.

**[Testimony of Moses Hirschy, for Defendants
(Recalled in Rebuttal).]**

MOSES HIRSCHY, a witness heretofore produced on behalf of the defendants, was recalled and in response to interrogatories propounded to him, testified as follows:

(Interrogated by Mr. WELSH.)

I have worked on Sand Island since the year 1903, and [628] worked about four years fishing for the plaintiff on Sand Island. In my judgment, Defendants' Exhibit "G" is substantially correct as to the shape of Sand Island, about as near as I would know, and in my judgment is a correct representation of the southern shore of the island, and I think it correctly represents the island as near as I would know.

(Defendants' Exhibit "F" was exhibited to this witness and by him identified.)

Q. That (referring to Defendants' Exhibit "F") correctly represents the shore of the island, doesn't it?

A. It looks pretty reasonable, only of course it don't come out just with that drawing exactly, but

(Testimony of Moses Hirschy.)

then that is not drawn just right, I don't see that he drew it just right.

Q. That shows how the shore runs on the south side (referring to Defendants' Exhibit "F")?

A. It looks right to me. I think this map correctly shows the south shore of the island.

Redirect Examination.

(Interrogated by Mr. WELSH.)

Q. As a matter of fact, counsel has taken the position with you that this map was made to represent Sand Island, whereas I am taking the position with you that the topography of the island is not correctly given here, and I want to know.

A. I will consider that.

Q. I want to know whether or not the southern shore of Sand Island, as actually on the ground, is not indented and more concave than this plat shows it to be? [629]

Mr. FULTON.—I object to this as leading and suggestive and stating to the witness primarily what the counsel very much desires he should testify to.

A. I don't want to say any more than I know in this case, because there might be such a thing that I don't understand.

Q. What I want to know about Sand Island, does it concave—does it go in further, little indentation and bays in it?

A. Sure, I know that sometimes we have trouble to get around, it is not just straight; it is concave some, yes. But then, I could not call it straight, the

(Testimony of Moses Hirschy.)

way I find it, when you seine and hook on teams, whenever you come down the stream you go along nicely and then get to a curve and it takes another four horses to make up coming around the point. It is not just straight; I could not call that straight.

Mr. FULTON.—Q. Have you any idea of what concave means—on the square?

A. Concave—I am not using these high words, and I would know a point in and out. I know what a crook is; I am not using these high words.

Q. (By Mr. FULTON.) Do you see any “crooks” around here?

A. Well, I guess when it comes to that business—

Mr. WELSH.—Q. Is there a crook on the southern shore of the island?

A. There is crooks along the island, certainly.

Mr. FULTON.—Q. That is, there were some crooks when you were there?

A. I guess there were some crooks when I was not there; maybe crooks when I am there too, yes.

[630]

[Order Approving Condensed Statement of Testimony and Evidence.]

The above and foregoing condensed statement of the testimony and evidence taken and admitted at the trial of the above-entitled cause for use on the appeal herein, together with the exhibits therein referred to and hereunto attached, was duly presented to the undersigned, Judge of the above-entitled court, before whom said cause was tried, and the

same has been duly examined and found to be a true, complete and properly prepared condensed statement of all the testimony and evidence offered, taken and admitted on the trial of said cause, and the same is hereby, in all respects, approved, this 3 day of December, 1913.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the Western District of Washington, Southern Division.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [631]

Plaintiff's Exhibit "E."

KNOW ALL MEN BY THESE PRESENTS, That an Act of Congress approved July 28, 1892, provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That authority be, and is hereby, given to the Secretary of War, when in his discretion it will be for the public good, to lease, for a period not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress; Provided, That nothing in this act contained shall be held to apply to mineral or phosphate lands."

And, Whereas, by order of the President of the United States dated August 29, 1863, all of the land known as Sand Island in the Estuary of the Columbia River, Oregon and Washington, was set apart for public uses as a Military Reservation;

And, Whereas, the land above described is now unoccupied and unproductive property under the control of the Secretary of War and is advertised for lease by authority of the Secretary of War dated February 10, 1905;

And, Whereas, the Columbia River Packers' Ass'n, of Astoria, Oregon, was the highest bidder for lease of Sites Nos. 2 and 3, and has applied for a lease thereof for a term of three (3) years.

NOW, THEREFORE, This agreement made on this 1st day of May, 1908, by and between Lieut. Col. S. W. Roessler, Corps of Engineers, U. S. Army, on behalf of the United States, of the first part, and the said Columbia River Packers' Ass'n, of the second part, WITNESSETH, That the said party of the first part for and in consideration of the rents, covenants and agreements hereinafter mentioned, does, for himself and his successors in office, hereby covenant and agree with the said party of the second [632] part, its executors, administrators and assigns, to let and lease, and does hereby let and lease, unto the said party of the second part, its executors, administrators and assigns, the parcel of land on Sand Island, and shown on the attached maps as Sites Nos. 2 and 3.

TO HAVE AND TO HOLD, The said premises with all the rights, easements and appurtenances

thereto belonging, for the term of three (3) years commencing on the 1st day of May, 1908, and terminating on the 30th day of April, 1911, subject to the following named conditions:

That the lessee file a bond acceptable to the United States in a sum equal in amount to the annual rental for the faithful performance of all obligations herein provided;

That this lease shall be subject to revocation by the Secretary of War, at his discretion, upon two (2) months' notice to the party of the second part, at any time prior to the expiration of the term of three (3) years for which it is made, unless sooner revoked for cause as hereinafter provided;

That all buildings or structures of any kind which may be erected by the lessee, its executors, administrators and assigns, during the said term of three (3) years, either upon the grounds leased or in the waters in front thereof, shall be removed on or before the date of the expiration of this lease, or within two (2) months from the date of the receipt of notice of revocation above provided for;

No excavations, other than for building purposes, shall be made, and no soil, shall be removed from the sites hereinbefore referred to;

That the said Columbia River Packers' Ass'n, its executors, administrators and assigns, shall pay for the use of the sites [633] herein leased the sum of Fifty-one Hundred Seventy-five (5175) dollars per annum, payment to be made in advance on the first day of May of each year during the life of this lease, to the Engineer Officer in charge of the river

and harbor district in which the land is located;

That the party of the second part will be allowed to erect such temporary structures for the housing of its employees, animals, etc., as may be necessary, with the understanding that any and all such structures must be entirely removed, at its own expense, on or before the date of expiration of its lease, or after two (2) months' notice of revocation, and with the further understanding that the number of such structures, location and dimensions shall be satisfactory to the party of the first part, and receive prior approval;

The grounds and adjacent waters must be left in as good condition as when occupied by the lessee, its executors, administrators and assigns. All buildings or structures not thus removed within the limit of time mentioned shall become the property of the United States;

That no structure not absolutely needed in connection with seining operations will be permitted to be erected on the site;

That no disreputable or disorderly persons will be housed on the leased land by the party of the second part;

That it must confine itself to the limits of its leased ground and it and its employees will avoid any action that may cause friction or trouble with the adjoining lessee or his employees.

Infraction of any of these conditions will be considered sufficient ground for immediate revocation of this lease.

The default of payment of annual rental for one

month from [634] the date upon which it becomes due, as stated herein, shall be deemed sufficient cause for enforcing the collection thereof from the bondsmen.

That if default shall be made in any of the covenants herein contained on the part and behalf of the said party of the second part, its executors, administrators and assigns, to be paid, kept, and performed, then and from thenceforth it may and shall be lawful for the said party of the first part, or his successors in office, to re-enter into and upon the said leased premises, and every part thereof.

And the said party of the second part for itself, its executors, administrators and assigns, does hereby covenant and agree with the party of the first part, and his successors in office, to hire, and lease the said premises herein described, with the rights, easements, and appurtenances thereunto belonging, on the conditions named herein, and for the period herein specified.

And the said party of the second part, for itself, its executors, administrators and assigns, further covenants and agrees with the party of the first part and his successors in office, that on the last day of the term of this lease, or if it is otherwise revoked, as herein provided for, said party of the second part, its executors, administrators and assigns, shall and will, peaceably and quietly lease, surrender and yield up unto the said party of the first part, or his successors in office, all and singular the said leased premises at the site hereinbefore referred to.

It is further understood and agreed that this lease

is subject to and shall not become operative or binding until it has received the approval of the Chief of Engineers, United States [635] Army.

IN WITNESS WHEREOF, The said party of the first part and the said party of the second part have hereunto set their hands and seals this 1st day of May, 1908.

Witnesses:

A. L. UPSON as to

S. W. ROESSLER, [Seal]

Lt. Col. Corps of Engineers.

Attest: as to

COLUMBIA RIVER PACKERS' ASSO-
CIATION.

S. ELMORE,

Vice-president.

GEO. H. GEORGE, Secretary.

[Seal of Columbia River Packers' Association.]

[Executed in duplicate.]

Approved: May 29, 1908.

SMITH S. LOUD (?)

Acting Chief of Engineers.

War Department, June 3, 1908.

Approved:

ROBERT SHAW OLIVER,

Assistant Secretary of War. [636]

[Endorsed]:—

162 M. C. R. U. S. Engineer Office.

53 Portland, Oregon.

Office of Chief of Engineers.

May 12 1908

41831

113

War Department.

LEASE.

Dated May 1, 1908, from the United States to the Columbia River Packers' Ass'n. of Astoria, Oregon, for certain parcels of land on Sand Island, estuary of the Columbia River, for the term of three years for seining purposes, shown on the attached map as Sites Nos. 2 & 3.

OFFICE OF THE SECRETARY

JUNE 1 1908

16351

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WAR DEPARTMENT.

Rental To— 5/1/10 paid 4/28/09.

Pltffs Ex E.

9/15/10 C. D. Savery, Exr. [637]

*In the District Court of the United States for the
Western District of Washington, Southern Divi-
sion.*

IN EQUITY—No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIA-
TION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Defendants.

Petition for Appeal and Order Thereon.

To the Honorable EDWARD E. CUSHMAN, Judge
of the Above-entitled Court:

Your petitioner, Columbia River Packers' Association, the plaintiff in the above-entitled cause, conceiving itself *grieved* by the judgment and decree rendered and entered in the above-entitled court in the above-entitled cause, on the 22d day of September, A. D. 1913, and believing that said judgment and decree is greatly to its prejudice and injury and is erroneous and inequitable, does hereby appeal from said judgment and decree, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenti-

cated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

G. C. FULTON,
Attorney for Plaintiff.

The foregoing petition for appeal is hereby granted and allowed and the claim of appeal therein made is hereby allowed, and the amount of the bond on said appeal and to supersede and [638] stay proceedings on said judgment and decree appealed from is hereby fixed at the sum of Twenty-five Thousand Dollars (\$25,000.00).

Dated this 3 day of December, A. D. 1913.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [639]

*In the District Court of the United States, for the
Western District of Washington, Southern Division.*

IN EQUITY—No. 1385.

COLUMBIA RIVER PACKERS' ASSOCIATION, a Corporation,

Plaintiff,

vs.

H. S. MCGOWAN, ERICK LINDSTROM, J. P.
COYLE, WALTER BUSSEY and I. N.
STENSLAND,

Defendants.

Assignments of Error.

The plaintiff makes the following Assignments of Error, which it avers occurred at the trial of the above-entitled cause, and prays for reversal of the decree in the above-entitled court in said cause and for a decree and judgment as prayed for by it in its amended complaint:

I.

The Court erred in not sustaining the demurrer of plaintiff to the cross-bill and complaint of defendant H. S. McGowan filed herein.

II.

The Court erred in not sustaining the demurrer of plaintiff to the cross-bill and complaint of defendant Erick Lindstrom filed herein.

III.

The Court erred in not sustaining the demurrer of plaintiff to the cross-bill and complaint of defendant J. P. Coyle filed herein.

IV.

The Court erred in not sustaining the petition and motion of plaintiff filed herein June 4, 1909, to dismiss this suit, and [640] erred in refusing to dismiss this suit, and not granting such petition and motion.

V.

The Court erred in holding, adjudging and decreeing that it had jurisdiction of the cause of suit set forth in plaintiff's amended complaint upon the showing made by the plaintiff in its petition and motion to dismiss said suit.

VI.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit set forth in the answer and in the cross-bill and complaint of the defendant H. S. McGowan.

VII.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit set forth in the answer and in the cross-bill and complaint of defendant Erick Lindstrom.

VIII.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit set forth in the answer and in the cross-bill and complaint of defendant J. P. Coyle.

IX.

The Court erred in holding, adjudging and decreeing that it had jurisdiction over the cause of suit herein.

X.

The Court erred in rendering and entering the decree of February 5, 1912, wherein and whereby it was adjudged and decreed that plaintiff should take nothing by this suit, and that the temporary injunction and restraining order theretofore issued against the defendants herein should be dissolved and vacated, and in dissolving and vacating such restraining order; and in holding, adjudging and decreeing that the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle were, or either was, at the time of the [641] commencement of this suit, and ever since had been and were until the expiration of the said

current fishing year, entitled to the exclusive right, or any right, to the exclusive or any use or occupation of the fisheries and fishing grounds described in the cross-bills of defendants herein, by the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, and their servants, and persons claiming by, through or under either of them, of the fisheries and fishing locations involved in this suit, and from asserting any dominion or right of possession or use of said fisheries or fishing grounds by virtue of any leasehold interest of the shore or tide lands abutting thereon, or adjacent thereto, or by reason of any fishing license or franchise which plaintiff may hold or possess.

XI.

The Court erred in its decree of February 5, 1912, referring this cause to the Honorable M. A. Langhorne, a Commissioner of this court, as Master *pro hac vice* to ascertain and report to this court the amount of damages suffered by the defendants and cross-complainants H. S. McGowan, Erick Lindstrom and J. P. Coyle, through their having been deprived of the use of their said fisheries from and after the 7th day of July, 1912, up to and until the date of said decree, or at any time, and in permitting the said defendants and cross-complainants H. S. McGowan, Erick Lindstrom and J. P. Coyle to offer and in receiving further testimony and evidence in said cause on said question of damages before such Master.

XII.

The Court erred in rendering and entering said decree of February 5, 1912, and each and every part thereof, and not granting the plaintiff a decree ac-

cordingly as prayed for in its amended complaint.
[642]

XIII.

The Court erred in holding, adjudging and decreeing that plaintiff was not entitled to the free and unobstructed ingress to and egress from the shore to Sites numbered Two (2) and Three (3) described in plaintiff's amended complaint; and in adjudging and decreeing that defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, or either of them, at any time had any right to construct, erect or maintain in front of the shore of said Sites 2 and 3 in plaintiff's amended complaint described between the line of low-water mark and line of navigability of the Columbia River any set net locations for catching salmon fish, or any permanent or fixed buoys or anchors, or any fixed appliance or appliances for the operation of any set net or set nets for taking salmon fish, or otherwise.

XIV.

The Court erred in holding, adjudging and decreeing that the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, were, or either was, entitled to construct, erect or maintain in the waters fronting the shore to said Sites numbered 2 and 3 described in plaintiff's amended complaint, between the line of low-water mark thereof and the line of navigability, in the channel of the Columbia River, any fixed structure or appliance, or any set net location, for operating set nets for taking salmon fish, or otherwise, or any fixed appliance which in any manner interfered with plaintiff's free ingress to and

egress from the shore to said sites, or which in any manner interfered with, or which prohibited plaintiff from navigating the waters in front of said shore by boats or seines, or which interfered with or prevented plaintiff from landing seines on such shores from the waters fronting thereon. [643]

XV.

The Court erred in holding, adjudging and decreeing that under the laws of the State of Oregon the owner of the shore of a navigable water therein does not have as an appurtenant thereto the right to the free and uninterrupted ingress to and egress from such shore, to the navigable waters fronting thereon.

XVI.

The Court erred in holding, adjudging and decreeing that under the laws of the State of Oregon a citizen of the State of Washington, without right, title or authority, other than a license issued by the Fish Commissioner of the State of Washington, to operate a fixed appliance for taking salmon fish in the waters of the Columbia River, is by such license alone entitled of right to construct, erect and maintain in the waters of such river, lying exclusively and wholly within the territorial boundaries of the State of Oregon, in front of shore lands there owned by citizens of Oregon, fixed fishing appliances for taking salmon fish, against the objection, protest and consent of such owner, whereby such shore owner against his protest and consent is deprived of access to such shore; and in further adjudging and decreeing that any interference by such shore owner of a structure so placed is unlawful and a tort, entitling the owner of such ap-

pliance to damages; and in further holding, adjudging and decreeing that the measure of such damage is determinable by the number of fish caught by seines operated from such shore when the appliances sought to be operated there were set nets.

XVII.

The Court erred in not sustaining the exceptions of plaintiff, and each thereof, to the Findings of Facts and Conclusions of Law made and filed by M. A. Langhorne, Special Master [644] appointed by this Court, to determine the amount of damages to be assessed against plaintiff herein, and in affirming and approving such findings of facts and conclusions of law, and each thereof and entering a judgment and decree thereon.

XVIII.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. I found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

“The long established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is, that the owner or lessor of a fishing location shall receive as rent for the location during a given fishing season one-third of the gross catch of fish made at said location during the fishing season. When the lessee furnishes the fishing gear, the lessee is entitled to two-thirds of the gross catch. However, when the lessor furnishes the fishing gear, as well as the location, he is entitled to one-

half of the gross catch for his rent for the location and the gear and the lessee is entitled to one-half of the gross catch."

The Court also erred in approving such finding.

XIX.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. II, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

"Under the rule for fixing the rental value of fishing locations upon the Columbia River as set forth in Finding of Fact No. I, it is impossible to determine the value without ascertaining the amount of the actual or probable catch of fish at a given location for a given season."

The Court also erred in approving such finding.

XX.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. III, found and made by M. A. Langhorne, [645] Special Master herein, which finding of fact was and is in words and figures following, to wit:

"The defendants and cross-complainants up to the time of the interlocutory decree herein, had by the restraining order issued in this case and had by the act of the plaintiff, been deprived of their fishing locations and of the use of their set nets therein during the entire time of four fishing seasons, viz.: the fishing seasons of the years 1908, 1909, 1910 and 1911."

The Court also erred in approving such finding.

XXI.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. IV, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

"During the entire time of the four fishing seasons mentioned in Finding of Fact Number Three (3), the plaintiff occupied the defendants' fishing locations and operated drag seines therein for the purpose of catching salmon and did catch large amounts of salmon each season, the amount of catch being as follows:

In the year 1908, 150 tons

In the year 1909, 104 tons

In the year 1910, 135 tons

In the year 1911, 390 tons

Total for four years 779 tons."

The Court also erred in approving such finding.

XXII.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. V, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

"The set nets which the defendants would have operated upon said fishing locations, had they not been prevented by plaintiff from occupying the locations, would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines, that is to say, two-thirds of

779 tons, the amount shown by Finding of Fact Number Four (4) as actually caught by the drag seines, making 518 tons which defendants' set nets would have caught during the four fishing seasons."

The Court also erred in approving such finding.
[646]

XXIII.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. VI, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

"I find that by reason of the foregoing facts the defendants were in the position of forced lessors of the locations in question, inasmuch as they owned them and were entitled to them but the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, that is to say, one-third of 518 tons, being 172 tons."

The Court also erred in approving such finding.

XXIV.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. VII, found and made by M. A. Langhorne, Special Master herein, which find-

ing of fact was and is in words and figures following, to wit:

“As set forth in Finding of Fact No. 6, the amount of fish to which defendants were entitled as the rent for the four seasons was in the aggregate, 172 tons, and I find that the average price of the fish for the four seasons was \$130.00 per ton, and the 172 tons of fish were of the value of 22,360.”

The Court also erred in approving such finding.

XXV.

The Court erred in not sustaining plaintiff's exception to Finding of Fact No. VIII, found and made by M. A. Langhorne, Special Master herein, which finding of fact was and is in words and figures following, to wit:

“The defendants and cross-complainants were equally interested in the said fishing locations.”

The Court also erred in approving such finding.

XXVI.

The Court erred in not sustaining plaintiff's exception [647] to Conclusion of Law No. II, found and made by M. A. Langhorne, Special Master herein, which conclusion of law was and is in words and figures following, to wit:

“The value of 172 tons of fish was the aggregate rental value of defendants' fishing locations for the four fishing seasons, and that value is the measure of defendants' damages in the aggregate. The value as set forth in the finding of fact being \$22,360, the defendants are entitled to recover that amount in the aggregate.”

The Court also erred in approving such finding.

XXVII.

The Court erred in not sustaining plaintiff's exception to Conclusion of Law No. II, found and made by M. A. Langhorne, Special Master herein, which conclusion of law was and is in words and figures following, to wit:

"The three defendants and cross-complainants, namely H. S. McGowan, Erick Lindstrom and J. P. Coyle are equally interested in the damages and should have a judgment accordingly."

The Court also erred in approving such finding.

XXVIII.

The Court erred in holding, adjudging and decreeing that there was evidence in the record which showed, or tended to show, that the established method by custom among fishermen of determining the rental value of fishing locations upon the Columbia River is that the owner or lessor of a fishing location shall receive as rent for the location during a given fishing season one-third of the gross catch of fish made at said location during the fishing season, when the lessor furnishes the fishing gear, but when the lessor furnishes the fishing gear, as well as the location, he is entitled to one-half of the gross catch for his rent for the location and the gear, and the lessee is entitled to one-half of the gross catch.

XXIX.

The Court erred in holding, adjudging and decreeing that [648] there was evidence showing or tending to show, that there was any rule for fixing the

rental value of fishing locations upon the Columbia River, and in holding that it is impossible to determine the value of fishing locations for rental purposes without ascertaining the amount of the actual or probable catch of fish at a given location for a given season.

XXX.

The Court erred in holding, adjudging and decreeing that the defendants and cross-complainants up to the time of the interlocutory decree herein, had, by the restraining order issued in this case and by the act of plaintiff, been deprived of their, or either of their fishing locations and of the use of their set nets therein during the fishing season for the years 1908, 1909, 1910 and 1911, or at or during any time whatever.

XXXI.

The Court erred in holding, adjudging and decreeing that during the entire time, or any part or portion of the four fishing seasons for the years 1908, 1909, 1910 and 1911, the plaintiff occupied the defendants' fishing locations and operated drag seines therein for the purpose of catching salmon, and did catch large amounts of salmon fish each season, and during the year 1908, 150 tons; during the year 1909, 104 tons; during the year 1910, 135 tons; and during the year 1911, 390 tons, or a total of 779 tons and in decreeing the plaintiff caught any fish therein.

XXXII.

The Court erred in holding, adjudging and decreeing that the set nets which the defendants would have operated upon said fishing locations, had they not

been prevented by plaintiff from occupying the locations, would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines, that is to say, two-thirds of 779 [649] tons, making a total of 518 tons; and in adjudging and decreeing such set nets would have caught any fish whatever.

XXXIII.

The Court erred in holding, adjudging and decreeing that the defendants were in the position of forced lessors of the locations in question; and in adjudging and decreeing that defendants owned them and were entitled to them, and the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing the fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, namely, one-third of 518 tons being 172 tons; and in adjudging and decreeing that defendants were, or either was, entitled to anything.

XXXIV.

The Court erred in holding, adjudging and decreeing that the amount of fish to which the defendants were entitled as rental for said fishing grounds for the four seasons of 1908, 1909, 1910 and 1911 was in the aggregate 172 tons, and that the average price of fish for 1908 was \$120.00 per ton; for the year 1909, \$125.00 per ton; for the year 1910, \$130.00 per ton; and for the year 1911, \$130.00 per ton, aggregating

the sum of \$22,083.00; and in adjudging and decreeing that defendants were, or either was, entitled to any sum whatever for rental, or otherwise.

XXXV.

The Court erred in holding, adjudging and decreeing that the defendants and cross-complainants H. S. McGowan, Erick Lindstrom and J. P. Coyle, were equally, or at all, interested in the fishing locations in controversy. [650]

XXXVI.

The Court erred in holding, adjudging and decreeing that the value of 172 tons of fish, or any sum whatever, was the aggregate rental value of defendants' H. S. McGowan, Erick Lindstrom, and J. P. Coyle, fishing locations for the four fishing seasons of 1908, 1909, 1910 and 1911; and in adjudging and decreeing that such value is the measure of such defendants' damages in this suit; and in adjudging and decreeing that the amount of such damages is \$22,083.00; and in adjudging and decreeing that such defendants were, or either was, entitled to any sum whatever.

XXXVII.

The Court erred in holding, adjudging and decreeing that the three defendants and cross-complainants, H. S. McGowan, Erick Lindstrom and J. P. Coyle, are equally interested in the damages, and each is entitled to one-third of the said amount of \$22,083.00; and in adjudging and decreeing that said defendants were, or either was, entitled to any sum or amount.

XXXVIII.

The Court erred in rendering and entering judg-

ment in favor of the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, or either of them, against the plaintiff, in the sum of \$22,038.00, or in any sum whatever.

XXXIX.

The Court erred in rendering and entering judgment in favor of the defendants H. S. McGowan, Erick Lindstrom and J. P. Coyle, or either of them, and against the United States Fidelity and Guaranty Company, in the sum of \$12,000.00, or in any sum whatever.

XL.

The Court erred in rendering and entering judgment [651] against the plaintiff in favor of defendant, H. S. McGowan, in the sum of \$7,361.00, together with the sum of \$361.10, costs of suit; and in rendering and entering judgment against the United States Fidelity and Guaranty Company in favor of defendant H. S. McGowan in the sum of \$4,000.00.

XLI.

The Court erred in rendering and entering judgment in favor of defendant Erick Lindstrom and against this plaintiff in the sum of \$7,361.00, together with the sum of \$361.10, costs of suit; and in rendering and entering judgment in favor of defendant Erick Lindstrom against the United States Fidelity and Guaranty Company in the sum of \$4,000.00.

XLII.

The Court erred in rendering and entering judgment in favor of defendant J. P. Coyle against the plaintiff, in the sum of \$7,361.00, together with the further sum of \$361.10, costs of suit; and in render-

ing and entering judgment in favor of defendant J. P. Coyle, against the United States Fidelity and Guaranty Company, in the sum of \$4,000.00.

XLIII.

The Court erred in not granting the plaintiff the relief demanded, and in dismissing plaintiff's suit.

XLIV.

There was no testimony or evidence whatever in the record in this case showing, or tending to show, that there was any established method, or any rule or custom, among fishermen for determining the value of a fishing ground or fishing location, or set net location, on the Columbia River, and there is no evidence in the record showing, or tending to show, or to the effect that the custom or method of determining the value of a fishing ground, [652] fishing location, or set net location, is one-third of the gross catch of fish thereon during the season when the lessee furnishes all gear, but when the lessor furnishes both grounds and gear, the lessor receives one-half of all fish caught thereon. Therefore, the Court erred in so holding, adjudging and decreeing.

XLV.

There is no evidence in the record sustaining the findings, judgment and decree rendered and entered by the above-entitled court, and the findings, judgment and decree rendered herein are not supported by the finding, but are against law and facts, and the Court erred in rendering and entering the same.

Wherefore, plaintiff prays that the judgments and decrees herein described and complained of be reversed, and that the said Court be directed to enter a

decree as prayed for by plaintiff in its amended bill of complaint.

G. C. FULTON,
Attorney for Plaintiff.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [653]

[Bond on Appeal.]

KNOW ALL MEN BY THESE PRESENTS:

That we, Columbia River Packers' Association, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, duly authorized and licensed to execute surety bonds in the State of Washington and all surety bonds required in the United States District Court for the Western District of Washington, Southern Division, as surety, are held and firmly bound unto H. S. McGowan, Erick Lindstrom and J. P. Coyle, in the full and just sum of Twenty-five Thousand Dollars (\$25,000.00), to be paid to said H. S. McGowan, Erick Lindstrom and J. P. Coyle, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this third day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

WHEREAS, lately at the District Court of the United States for the Western District of Washing-

ton, Southern Division, in a suit pending in said court between Columbia River Packers' Association, plaintiff, and H. S. McGowan, Erick Lindstrom and J. P. Coyle, defendants, a decree was rendered against the Columbia River Packers' Association, and the said Columbia River Packers' Association, having obtained an appeal and having appealed therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, and said appeal having been allowed to reverse the decree in the aforesaid suit, and a citation having been issued directed to the said H. S. McGowan, Erick Lindstrom and J. P. Coyle, citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within [654] thirty (30) days from the date of said citation.

Now, the condition of the above obligation is such, that if the said Columbia River Packers' Association shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

COLUMBIA RIVER PACKERS' ASSO-
CIATION, [Seal]

By W. O. BARNES,
Its Secretary.

[Seal of the Columbia River Packers' Association.]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY. [Seal]

By F. H. HILL,
Its Attorney in Fact.

[Seal of Surety Co.]

Signed and delivered in the presence of:

W. M. SMITH.

O. A. WIRKKOLA.

Approved this 3d day of December, A. D. 1913, and proceedings stayed.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [655]

Citation on Appeal [Copy].

To H. S. McGowan, Erick Lindstrom and J. P. Coyle,
Greeting:

WHEREAS, the 'Columbia River Packers' Association, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the Western District of Washington, Southern Division, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, to do and receive what may appertain to justice to be done in the premises, and to show cause, if any there be, why the said judgment and decree rendered and entered in said District Court aforesaid, in said appeal mentioned, should not be reversed, modi-

fied or corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of Tacoma, in the United States District Court, Western District of Washington, Southern Division, this 3d day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

EDWARD E. CUSHMAN,
Judge of United States District Court, Western District of Washington, Southern Division.

Due service of the foregoing Citation on Appeal is hereby accepted and acknowledged together with a true copy thereof, this 3d day of December, 1913.

WELSH & WELSH,
DORR & HADLEY,
Attorneys for Defendants. [656]

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [657]

In the United States District Court for the Western District of Washington, Southern Division.

No. 1385-C.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Complainant,

vs.

H. S. McGOWAN et al.,

Defendants.

**Order [Directing Certification of All Exhibits,
Except Plaintiff's Exhibit "E."]**

It appearing to the Court that all of the exhibits introduced in evidence, on the trial of this cause, excepting Plaintiff's Exhibit "E," should be inspected by the Appellate Court, on the appeal in this cause.

IT IS THEREFORE ORDERED that all of the exhibits introduced in evidence, on the trial of this cause by each of the parties, excepting only Plaintiff's Exhibit "E," be certified up with the record by the Clerk of this court to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such exhibits need not be included in the printed abstract of record on appeal. Plaintiff's Exhibit "E" shall be printed in abstract of record on appeal.

Done in open court third day of December, A. D. 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [658]

**[Order Extending Time to March 3, 1914, to File
Record on Appeal (Copy).]**

*In the United States District Court for the Western
District of Washington, Southern Division.*

**COLUMBIA RIVER PACKERS' ASSOCIA-
TION,**

Complainant and Appellant,

vs.

H. S. McGOWAN et al.,

Defendants and Appellees.

Upon application of both complainant and defend-
ant herein by their respective attorneys, and good
cause appearing therefor,

IT IS ORDERED that the time within which the
plaintiff shall prepare and file transcript upon the
appeal of this cause to the United States Circuit
Court of Appeals for the Ninth Circuit, be and
hereby is extended for an additional period of 60
days, to wit: until the 3d day of March, 1914.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [659]

**[Order Extending Time to April 15, 1914, to File
Record on Appeal (Copy).]**

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

**COLUMBIA RIVER PACKERS' ASSOCIA-
TION, a Corporation,**

Appellant,

vs.

H. S. McGOWAN et al.,

Appellees.

For good cause shown,

IT IS NOW ORDERED that the time within
which the transcript on appeal in this cause may be
filed in San Francisco, California, be and the same is
hereby extended to and including April 15th, 1914.

Dated February 28th, 1914.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Feb. 28, 1914. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [660]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States
District Court for the Western District of Washing-

ton, do hereby certify and return that the foregoing pages numbered from 1 to 660 inclusive, contain a full, true and correct transcript of the record and proceedings in the case of Columbia River Packers' Association vs. McGowan et al., lately pending in this court, as required by the praecipe of counsel filed in said cause, as the originals thereof appear on file in this court at the City of Tacoma, in the District aforesaid.

I further certify and attach hereto the original Citation, original order extending time to March 3d, 1914, and original order extending time to April 15th, 1914; and I do further certify that pursuant to the order made in this cause on December 3d, 1913 (a copy of which order is incorporated in this transcript of record), all exhibits introduced in evidence on the trial of this cause by each party, excepting only Plaintiff's Exhibit "E" are hereby certified and attached hereto.

I further certify that the cost of certifying the foregoing transcript amounted to the sum of \$521.50, which amount has been paid to the Clerk by the solicitor for appellant.

ATTEST my official signature and the seal of this Court at Tacoma, in said District, this first day of April, A. D. 1914.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk.

Citation on Appeal [Original].

To H. S. McGowan, Erick Lindstrom and J. P. Coyle,
Greeting:

WHEREAS, the Columbia River Packers' Association, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the Western District of Washington, Southern Division, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, to do and receive what may appertain to justice to be done in the premises, and to show cause, if any there be, why the said judgment and decree rendered and entered in said District Court aforesaid, in said appeal mentioned, should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of Tacoma, in the United States District Court, Western District of Washington, Southern Division, this 3d day of December, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal]

EDWARD E. CUSHMAN,
Judge of United States District Court, Western District of Washington, Southern Division.

Due service of the foregoing citation on appeal is

hereby accepted and acknowledged, together with a true copy thereof, this 3d day of December, 1913.

WELSH & WELSH,
DORR & HADLEY,
Attorneys for Defendants.

[Endorsed]: No. ——. United States District Court, Western District of Washington, Southern Division. Columbia River Packers' Association, Plaintiff, vs. H. S. McGowan et al., Defendants. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. G. C. Fulton, Attorney for Appellant.

[Order Extending Time to March 3, 1914, to File Record on Appeal (Original).]

In the United States District Court for the Western District of Washington, Southern Division.

COLUMBIA RIVER PACKERS' ASSOCIATION,

Complainant and Appellant,
vs.

H. S. McGOWAN et al.,

Defendants and Appellees.

Upon application of both complainant and defendant herein by their respective attorneys, and good cause appearing therefor,

IT IS ORDERED that the time within which the plaintiff shall prepare and file transcript upon the

appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, be and hereby is extended for an additional period of 60 days, to wit: until the 3d day of March, 1914.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 1385-C. In the District Court of the United States for the Western District of Washington, Tacoma. Columbia River Packers' Association, Complainant, vs. H. S. McGowan et al., Defendants. Order Extending Time for Transcript. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Order Extending Time to April 15, 1914, to File
Record on Appeal (Original).]

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. —.

COLUMBIA RIVER PACKERS' ASSOCIA-
TION, a Corporation,

Appellant,

vs.

H. S. McGOWAN et al.,

Appellees.

For good cause shown,

IT IS NOW ORDERED that the time within
which the transcript on appeal in this cause may be

filed in San Francisco, California, be, and the same is hereby extended to and including April 15th, 1914.

Dated February 28th, 1914.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: No. ——. In the Circuit Court of Appeals of the United States for the Ninth Circuit. Columbia River Packers' Association, a Corporation, Appellant, vs. H. S. McGowan et al., Appellees. Order Extending Time on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 28, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2396. United States Circuit Court of Appeals for the Ninth Circuit. Columbia River Packers' Association, a Corporation, Appellant, vs. H. S. McGowan, Erick Lindstrom, J. P. Coyle, Walter Bussey and I. N. Stensland, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Received and filed April 2, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COLUMBIA RIVER PACKERS
ASSOCIATION (a corporation),
Appellant,

vs.

H. S. McGOWAN, ERICK LIND-
STROM and J. P. COYLE,
Appellees.

**Appeal from the United States District Court for
the Western District of Washington,
Southern Division.**

HON. GEORGE DONWORTH, JUDGE.

HON. EDWARD E. CUSHMAN, JUDGE.

**Motion and Notice to Dismiss Appeal and Briefs for
Appellees on Motion to Dismiss and
on the Merits.**

WELSH & WELSH, South Bend, Wash.

DORR & HADLEY, Seattle, Wash.

Solicitors for Appellees.

G. C. FULTON, Astoria, Oregon,

Solicitor for Appellant.

MOTION TO DISMISS THE APPEAL.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COLUMBIA RIVER PACKERS
ASSOCIATION (a corporation),
Appellant,

vs.

H. S. McGOWAN, ERICK LIND-
STROM and J. P. COYLE,
Appellees.

No. 2396

Come now, H. S. McGowan, Erick Lindstrom and J. P. Coyle, appellees in the above entitled cause, by Welsh & Welsh and Dorr & Hadley, their solicitors, and move the Court to dismiss the appeal herein upon the following grounds:

1. Failure to include, as a party to this appeal, the surety on the injunction bonds, to-wit: The United States Fidelity and Guaranty Company, against which a joint judgment to the extent of its liability was entered, it being a necessary party to this appeal.

2. Absence of any showing in the record that a summons or notice was served or any attempt made to sever the interest of appellant from that of the surety, so that a separate appeal might be maintained.

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees.

NOTICE OF HEARING ON MOTION TO
DISMISS THE APPEAL.

UNITED STATES CIRCUIT COURT OF
APPEALS.

For the Ninth Circuit.

COLUMBIA RIVER PACKERS
ASSOCIATION, a corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LIND-
STROM and J. P. COYLE,

Appellees.

No. 2396.

To the Columbia River Packers Association, Appellant in the above entitled cause, and to G. C. Fulton, its solicitor:

You are hereby notified that the foregoing motion to dismiss the appeal in the above entitled cause will be called up for hearing before the Court at the time said appeal is to be heard, to-wit: at the United States Court room in Seattle, Washington, September 14, 1914, or as soon thereafter as counsel can be heard.

WELSH & WELSH and

DORR & HADLEY,

Solicitors for Appellees.

ARGUMENT ON MOTION TO DISMISS THE APPEAL.

It appears from the record in this case that The United States Fidelity and Guaranty Company became surety upon appellant's injunction bonds in this action, two of which were executed by order of the Court, first, a bond for \$2,000.00, and second, an additional bond for \$10,000.00, making the aggregate sum of \$12,000.00 (Tr. 17 to 20). The temporary injunction and restraining order were dissolved by an interlocutory decree, and the cause was referred to a master to take testimony and compute the damages to appellees by reason of the issuance of the temporary injunction and restraining order as aforesaid. (Tr. pp. 173-178). Thereafter, in the final decree (Tr. 197-202), judgment was entered against said surety company for the aggregate sum of \$12,000.00, said amount being divided equally between the three appellees, making \$4,000.00 in favor of each. The Court found that the appellees were equally interested in the damages recovered, and also found that as the liability of the surety company was limited to the sum of \$12,000.00, one-third of that amount, or \$4,000.00, should be awarded in favor of each appellee. The aggregate judgment awarded in favor of each appellee is \$7,361.00 and one-third of the costs, or \$361.10 costs in favor of each. The judgment in favor of each appellee also reads as follows:

“shall also recover in this action from the United States Fidelity and Guaranty Company, surety as aforesaid, the sum of \$4,000.00, which amount is included in the above sum awarded him against the complainant, it being especially hereby declared that the liability of said surety and of the complainant is co-equal to the extent of \$4,000.00 and no more, but that the complainant, the Columbia River Packers Association is liable for the whole of said sum of \$7,361.00 and costs as taxed.” (Tr. pp. 200-202.) .

It will be seen by the foregoing quotation from the decree that there is no segregation of liability as between appellant and the surety company, but their liability is expressly declared to be “co-equal” to the extent of \$4,000.00 in each instance. It is manifest, therefore, that the surety company is affected by the appeal and should have been joined therein. No attempt whatever was made to do this. Neither the petition for appeal nor the order thereon (Tr. pp. 726-727), nor the citation for appeal (Tr. pp. 752-753), in any manner joins the surety company, but the appellant appeals alone and independently.

No showing is made in the record that a summons or notice was served by appellant upon the surety, or that appellant made any attempt to sever its interest from that of the surety so that a separate appeal might be maintained.

POINTS AND AUTHORITIES.

FIRST.

The Trial Court, upon dissolving the temporary injunction and restraining order, had jurisdiction to assess damages and to enter a judgment against the surety.

The case of *Russell vs. Farley*, 105 U. S. 433; 26 L. Ed. 1060, announces the rule that a chancery court, in the absence of any statutory regulation, has the general power, on dissolution of an injunction, to assess damages. This case has been widely cited and followed, and may be considered the leading case on this point.

In *Blossom vs. Railroad Company*, 1 Wallace 655, 17 L. Ed. 673, Mr. Justice Miller states the law establishing the status of a surety, to be as follows:

“It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation, which the court is bound to protect. Sureties, signing appeal bonds, stay bonds, delivery bonds, and receptors under writs of attachment, become *quasi* parties to the proceedings, and subject themselves to the jurisdiction

of the court, so that summary judgments may be rendered on their bonds or recognizances.”
(1 Wall. pp. 655-656.)

The Circuit Court of Appeals for the Ninth Circuit has followed the rule as announced by the United States Supreme Court.

In *Tyler Min. Co. vs. Last Chance Min. Co.*, 90 Fed. 15 (9th C. C. A.), this court affirmed the action of the trial court in dissolving an injunction and entering judgment for the damages thereunder against the sureties on the injunction bond. The case of *Russell vs. Farley*, previously referred to, is cited as an authority.

The case of *Empire State-Idaho Mining & Developing Co., vs. Hanley*, 136 Fed. 99 (9th C. C. A.), decided by this Court in 1905, affirmed the action of the trial court in entering a judgment against the surety on an appeal bond. The cases of *Tyler Min. Co. vs. Last Chance Min. Co.* (*supra*) and *Blossom vs. Railroad Company* (*supra*), were followed.

In other circuits the same rule has been established.

Cimotti Unhairing Co. vs. American Fur Refining Co., 158 Fed. 171 (C. C., N. J.), follows the Last Chance case (*supra*) and the court entered a judgment against the principal and sureties on the injunction bond for damages caused by the issuance of the injunction. This case was affirmed by the Circuit Court of Appeals for the Third Circuit, 168 Fed. 529.

Other authorities to sustain this proposition are:

Lea vs. Deakin, 13 Fed. 514 (C. C., Ill.)

Coosaw Min. Co. vs. Farmers Min. Co., 51 Fed. 107 (C. C., So. Car.)

West vs. East Coast Cedar Co., 113 Fed. 742 (4th C. C. A.)

SECOND.

The surety is a necessary party to this appeal.

THIRD.

The appeal is defective for failure to join the surety and should be dismissed.

The authorities to sustain the second and third points can be considered together.

Estis vs. Trabue, 128 U. S. 225, 32 L. Ed. 437, is a case directly in point. A writ of error to the United States District Court for the Northern District of Mississippi was brought to review a judgment of that court against *Estis, Doan & Co.*, the original claimants, in an attachment suit. The judgment was entered against the claimants and their sureties on the attachment bond. The Supreme Court held that this made the sureties necessary parties to the writ of error, and as they were not included, the writ was dismissed. We quote from the opinion (pp. 229-230):

“But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under § 1005. The judgment is distinctly one against ‘the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond,’ joint-

ly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. *Ex parte Sawyer*, 21 Wall. 235, 240.

“It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. *Williams vs. Bank of the United States*, 11 Wheat. 414; *Owings vs. Kincannon*, 7 Pet. 399; *Heirs of Wilson vs. Life and Fire Ins. Co.*, 12 Pet. 140; *Todd vs. Daniel*, 16 Pet. 521; *Smyth vs. Strader*, 12 How. 327; *Davenport vs. Fletcher*, 16 How. 142; *Mussina vs. Cavoza*, 20 How. 280, 289; *Sheldon vs. Clifton*, 23 How. 481, 484; *Masterson vs. Herndon*, 10 Wall. 416; *Hampton vs. Rouse*, 13 Wall. 187; *Simpson vs. Greeley*, 20 Wall. 152; *Feibelman vs. Packard*, 108 U. S. 14.

“Where there is a substantial defect in a writ of error, which this court cannot amend,

it has no jurisdiction to try the case. *Heirs of Wilson vs. Life and Fire Ins. Co.*, 12 Pet. 140. It will then, of its own motion, dismiss the case, without awaiting the action of a party. *Hilton vs. Dickinson*, 108 U. S. 165, 168.

“For these reasons the writ of error is dismissed.”

The above case has been widely cited and followed.

In *Dolan vs. Jennings*, 139 U. S. 385, 35 L. Ed. 217, an appeal was dismissed in which the representatives of a deceased joint defendant were not made parties, the court holding the defect to be jurisdictional.

In *Mason vs. United States*, 136 U. S. 581, 34 L. Ed. 545, a writ of error was taken to the Supreme Court of the United States from a judgment of the U. S. Circuit Court for the Northern District of Illinois against a postmaster and his sureties. The writ was sued out by two of the sureties without joining the principal and the other sureties, and the Supreme Court refused to allow any amendment and dismissed the writ.

The rule and the reasons therefor are clearly stated in *Masterson vs. Herndon*, 10 Wall. 416, 19 L. Ed. 953, as follows:

“It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a

joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this:

1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed.

2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record." (pp. 416-417.)

To the same effect are:

Hardee vs. Wilson, 146 U. S. 179, 36 L. Ed. 933.

Inglehart vs. Stansbury, 151 U. S. 68, 38 L. Ed. 76.

Davis vs. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563.

Sipperly vs. Smith, 155 U. S. 86, 39 L. Ed. 79.

Beardsley vs. Ark. & Louisiana Railway, 158 U. S. 123, 39 L. Ed. 919.

The Circuit Courts of Appeal, in various circuits, have also announced the same rule:

Ayres vs. Polsdorfer (6th C. C. A.), 105 Fed. 737.

Hedges vs. Seibert Cylinder Oil Cup Co., (3rd C. C. A.) 50 Fed. 643.

Galveston H. & R. Ry. Co. vs. House, (5th C. C. A.) 102 Fed. 112.

Loveless vs. Ransom, (7th C. C. A.) 107 Fed. 626.

Johnson vs. Trust Co. of America, (8th C. C. A.) 104 Fed. 174.

Grand Island & W. C. R. Co. vs. Sweeny, (8th C. C. A.) 103 Fed. 342.

Humes vs. Third National Bank (5th C. C. A.) 54 Fed. 917.

In the last case, Humes and Harris, sureties on a supersedeas bond, sued out a writ of error to review a joint judgment entered against them and the principal defendant. The writ of error was dismissed for failure to join the principal defendant with the sureties in the writ of error.

“The cause coming on for hearing, the defendant in error filed a motion to dismiss the writ of error—

‘Because the defendant E. C. Gordon, against whom there is a joint judgment with plaintiffs in error, has not joined in said writ of error, and no reason is shown in the record for his not doing so, nor does the record show that any request was made of him to join, or refusal on his part to do so.’

“We are of opinion that the motion to dismiss the writ of error is well taken. It is apparent on the face of the record that the judgment of the court below was a joint judgment against E. C. Gordon, C. C. Harris, and Milton Humes. It is immaterial that Gordon was principal and the others sureties. If a writ of error could bring that judgment to this court,—a question not free from doubt,—the

long-settled practice requires that all of the joint defendants should join in the writ, or that there should have been a summons and severance, or equivalent proceedings, to entitle the plaintiffs in error to proceed alone, and the successful party below proceed to enforce his judgment against the defendant who does not desire to have it reviewed and this court not be required to decide a second time the same question on the same record.” (p. 919.)

The principle urged by appellees, in support of this motion, is not peculiar to the Federal Courts, but has been recognized in the State Courts as well. In *Carstens vs. Gustin*, 18 Wash. 90, it was held that the sureties on a claim and delivery bond against whom a judgment had been entered, were necessary parties to an appeal and that the failure to serve notice upon the sureties was fatal to the appeal, and it was therefore dismissed upon authority of *Estis vs. Trabue*, 128 U. S. 225, to which we have previously referred.

Respectfully submitted,

WELSH & WELSH and

DORR & HADLEY,

Solicitors for Appellees.

ON THE MERITS OF THE CASE.

If the court shall deny appellees' motion to dismiss the appeal herein, which motion is hereinbefore set out, together with the brief and argument thereon, then appellees submit the following statement and argument upon the merits of the case.

STATEMENT OF CASE.

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Southern Division. The final judgment appealed from was entered by the Honorable Edward E. Cushman, Judge, on the 22nd day of September, 1913, (Tr. 197-202). The action was commenced by the appellant in the year 1908, the amended complaint upon which the cause thereafter proceeded having been filed on the 11th day of August, 1908. The amended complaint and the filing record thereof will be found at pp. 4 to 17 of the Transcript.

The complaint first alleges the corporate existence of appellant under the laws of the State of Oregon, and that the necessary steps had been taken to authorize it to do business in the State of Washington. It may be remarked here that at the time the suit was brought, the site and waters in controversy, commonly known as Sand Island and contiguous waters, in the Columbia River, were supposed by all parties to be in the State of Washington. It is contended by plaintiff that subsequently, in November, 1908, by the decision of the Supreme Court

in the case of *State of Washington vs. State of Oregon*, 211 U. S. 127, and by opinion on *Petition for Rehearing*, 214 U. S. 205, Sand Island was held to be within the territorial limits of the State of Oregon. Reference is made to the above decision at this time in order to explain the frequent references made to the State of Washington in the pleadings and record.

After averring that the defendants are each citizens and residents of Pacific County, Washington, within the Western District of said State and in the jurisdiction of the court, the complaint proceeds to state that long prior to the institution of this suit, the United States of America was and still is the owner in fee of that certain tract of land situated in Pacific County, State of Washington, being an island in the Columbia River near the mouth thereof, generally known as Sand Island; together with all tide lands, water rights, privileges, and easements surrounding and adjacent thereto; that Sand Island was by proclamation of the President of the United States, duly issued and published on the 29th day of August, 1863, reserved from sale, for military purposes and for a military reservation, and that the same has ever since been held as such by the United States; that inasmuch as said island was not for the time being required for public use, the Secretary of War of the United States, by authority of an act of Congress, did on the first day of May, 1908, duly lease to the plaintiff in this action for the term of three years from

said date, that portion of Sand Island designated on the maps and plats of the Government survey as Sites 2 and 3. It is further alleged that said lease carried with it the tide lands, water rights, fishing rights and riparian rights adjacent to the sites above mentioned, and to the navigable channel of the Columbia River.

It is alleged that the plaintiff thereupon entered into possession of the leased premises, which are described as being above the line of low water mark on the south side of Sand Island, consisting of a sandy beach up to the line of high water, beyond and above which the island is alleged to be composed of sand, upon which practically no vegetation grows; that the bed of the river below low water mark is quite level with a hard sandy bottom and a gradual slope for a short distance into deep waters; that the premises are and at all times have been of great value for the right of fishery thereon, and the right to haul and land seines thereon and in front thereof, to operate seines from the shore into the waters, and to haul the same on to the shore for the purpose of catching salmon fish during the salmon fishing season of each year on the Columbia River; and that the premises were leased by the United States to the plaintiff for the sole purpose of being used and employed as a fishery, and for the sole purpose of operating seines for catching salmon fish from the shore in the waters of said river and landing the same on the shores.

The complaint further avers that under the laws

of the United States the said waters are required to be kept free from obstructions, and that by virtue of said laws and said lease the plaintiff is entitled to have said waters and the channel of said river free and unobstructed, and is entitled to the free and unobstructed ingress to and egress from said premises, and also to the exclusive right of operating seines for the purpose of catching salmon fish from said shores in the waters of said river and landing the same on said shores.

It is next alleged that on the 30th day of June, 1908, pursuant to the laws of the State of Washington, the plaintiff applied for and obtained from the Fish Commissioner of the State of Washington three licenses to operate three seines upon said Sites 2 and 3, said licenses being numbered respectively 2391, 2392 and 2393, and that thereupon the plaintiff became entitled to operate three seines within the waters of the Columbia River for the period of one year from said date; that on the second day of July, 1908, the plaintiff took upon said leased lands its three seines and seining outfit, having made preparation to employ said leased premises in the operation of said seines for the purpose of taking and catching salmon; that in order to operate seines in front of said Sites 2 and 3, it is necessary that the waters and channel of said river shall be free and unobstructed for the reason that it is necessary to lay each seine out into the waters of the river a distance of two or three hundred fathoms, each seine being about that long, and to per-

mit the same to drift with the tide and current, and then to haul the same in onto the shore; that plaintiff was proceeding to so operate its seines when the defendants wrongfully and without plaintiff's consent, placed in the channel of said navigable waters, directly in front of said sites 2 and 3, certain obstructions consisting of large stones to which were attached wire cables, chains and large timbers for a float or buoy; that the obstructions were seven in number and were placed in the waters of the river about fifty to one hundred feet from the shore and about two hundred or three hundred feet apart; that the stones and anchors or weights were so placed that plaintiff could not operate its seines in the waters of the river, and could not land its seines on the shores of the leased premises.

The plaintiff next avers that it thereupon removed all of the obstructions and was proceeding to operate its seines at said place when the defendants again, on the 4th day of July, 1908, placed six more of said obstructions in front of the leased premises in practically the same position as those removed; that the defendants threaten to continue to place other obstructions in said waters and to continue to use and employ the same and will do so unless restrained by the Court; that said obstructions were not so placed for the purpose of trade or commerce or for any particular use, but for the purpose of harassing and annoying plaintiff and preventing it from operating its seines, and interfering with the plaintiff's free ingress to and egress from said premises.

The complaint alleged the existence of an emergency calling for a preliminary injunction against defendants and upon plaintiff's application, and upon giving a bond, first in the sum of \$2,000.00 and later by order of Court in the sum of \$10,000.00, with the United States Fidelity and Guaranty Company as surety, a restraining order was issued and continued in force *pendente lite*, restraining the defendants from placing or maintaining the appliances aforesaid. (Tr. 20-22.)

The defendants answered the complaint and also interposed a cross-complaint, and for convenience and by stipulation, the answer and cross-complaint of the defendant H. S. McGowan only is set out in the Transcript, it being stipulated that in essential particulars the answers and cross-complaints of the other defendants are identical with that of the defendant, McGowan, and that they may be omitted from the Transcript. (See Stipulation, Tr. 124-126.) The answer and cross-complaint of the defendant, McGowan, is set out at pp. 23-93 of the Transcript. The answer contains certain admissions and denials of allegations in plaintiff's complaint, and particularly denies that the Secretary of War of the United States ever at any time leased to the plaintiff any fishing rights in the waters surrounding Sand Island, and avers that neither the Secretary of War nor the United States itself has any power or authority to lease to plaintiff or any other person, any fishing rights, or the right to fish for salmon in the waters of the Columbia River; denies that the Secretary of War leased said prem-

ises to plaintiff for the sole purpose of being used and employed as a fishery, or for the sole purpose of operating seines for catching salmon from the waters of the river and landing the same upon the shore; denies that plaintiff is entitled to the exclusive right of operating seines for the purpose of catching salmon in the waters of the river and landing the same upon the shore; denies that the defendants wrongfully or in violation of plaintiff's rights or of the laws of the United States or of any law, placed obstructions in the navigable waters of the Columbia River in front of plaintiff's leased premises; denies that defendants have in any manner prevented plaintiff from operating seines on sites numbered 2 and 3; denies that defendants have excluded the plaintiff or the public from operating gill nets, drift nets or seines in the waters of the river; except that defendants admit that on July 2nd, 1908, they were the owners of and engaged in the operation of set nets in said waters on the south side of Sand Island, which were operated for the purpose of catching salmon under licenses issued by the Fish Commissioner of the State of Washington, on the 15th of April, 1908; the set nets being situated below the line of ordinary low tide, and also below the line of extreme low tide, and between the line of extreme low tide and the channel of the river.

The answer admits and avers that under and in pursuance of said licenses the defendants did on or about the 16th day of June, 1908, cause the locations for said set nets and each of them to be made by securely anchoring a buoy upon each location, upon

each of which buoys they caused to be posted the number of the license under which such set net was operated; that at the same place where defendants were operating their said set nets under licenses as aforesaid, their predecessors in interest operated fishing appliances for the purpose of catching salmon, under licenses issued by the Fish Commissioner of the State of Washington each year for the fishing seasons of 1902 to 1907 inclusive; and the defendants were in like manner operating their set nets under their aforesaid licenses for the year 1908 at the time they were enjoined in this action, and were so operating long before the plaintiff commenced its fishing with drag seines at said place; that prior to the commencement of this action the defendants had expended large sums of money in acquiring the rights of fishing and operating said set nets, which rights were of much value to the defendants by reason of the salmon caught and to be caught in the set nets during the fishing seasons of the year 1908 and future years; that salmon fish in the Columbia River are of great value and ascend the river in large numbers and schools at certain periods during each year, and on the 16th day of June, 1908, and at all times thereafter, they were ascending said river in large quantities, and would so ascend the river in large quantities this and each future year; that on the 16th day of June, 1908, and at all times thereafter until enjoined by the Court, the defendants were operating their said set nets for the purpose of catching salmon for sale in the market, and they had derived and expected to

derive large profits from their set nets; that at the time of the commencement of this action, and ever since the 16th day of June, 1908, the defendants were operating their set nets in the only manner they could be operated, and they were in no way interfering with sites 2 and 3 on Sand Island, the operations being entirely below the low tide line in front of said sites; that the operation of the set nets in no manner interfered with the navigation of the river for the purposes of trade and commerce, or for any other purpose for which the navigation of the river is or can be used; the set nets being so constructed as not to extend to the channel of the river, and the water at the place of their location not exceeding six feet in depth at low tide; that each set net would catch many valuable salmon if the defendants be permitted to fish and operate them, amounting to many thousands of dollars in value, the exact amount being impossible now to determine.

Many other things are circumstantially admitted, denied and alleged in the answer and cross-complaint, and while the whole thereof is urged on this appeal yet we believe the foregoing outlines the more essential points set up by the defendants. The cross-complaint alleges the necessity of a restraining order against the plaintiff, and concludes with a prayer for an injunction enjoining the plaintiff from interfering with defendants' operation of their set nets, and also for damages and general equitable relief.

The plaintiff answered the defendants' cross-complaint and admitted that the defendants obtained set net licenses from the State of Washington, but denied that the licenses authorized the defendants to operate under the same in any particular waters, averring that they were roving licenses. The answer to the cross-complaint admitted and denied many things, and generally maintained the position set forth in the complaint. Said pleading is set out at pp. 97-120 of the Transcript and defendants' replication thereto is found at p. 121 of the Transcript.

Thereafter the plaintiff petitioned the Court for the dismissal of the action without prejudice, on the ground that subsequent to the bringing of the action, the Supreme Court of the United States had decided that Sand Island and the waters in controversy are in the State of Oregon. Reference to said decision is hereinbefore made. It was contended by the plaintiff before the Hon. George Donworth, the judge presiding, that the Circuit Court of the United States for the Western District of Washington was for the above stated reason without jurisdiction of the subject matter of the action. Jurisdiction was not challenged on any other ground. The Court denied the petition to dismiss, the opinion of Judge Donworth being set out at pp. 130-145 of the Transcript. A *nunc pro tunc* order denying the petition was afterward entered by the Hon. Edward E. Cushman, judge, and is set out at pp. 146-147 of the Transcript.

After the denial of the petition to dismiss the action, the plaintiff, by leave of Court, filed a Supplemental Bill of Complaint, in which it was alleged that after the filing of the original bill, the plaintiff discovered that it had erroneously alleged in the original bill that Sand Island is in the State of Washington, whereas it has since learned that the island is within the territorial limits of the State of Oregon. The supplemental bill further alleges that for many years prior to the institution of this suit, it had ever been contended by the citizens and officials of the State of Washington that Sand Island is within the boundaries of said State, and that such claim was practically admitted by the citizens of Oregon; that the Fish Commissioner of Washington at all times held that the island was within the boundaries of Washington, and the Master Fish Warden of Oregon at all times conceded that it was in the State of Washington, and recognized licenses issued by the Fish Commissioner of Washington for seines used and employed on Sand Island; and that plaintiff at all times believed that the island was in the State of Washington until the 16th day of November, 1908, when it was otherwise decided by the Supreme Court of the United States, as aforesaid. It was further alleged that the island is now and at all times has been in the County of Clatsop in the State of Oregon, and the plaintiff prayed that if the Court shall be of the opinion that it has jurisdiction in the premises and of this suit, then it asks for judgment as prayed

in the original bill, otherwise for judgment of dismissal. The supplemental bill of complaint is set out at pp. 149-155 of the Transcript. The defendants answered the supplemental bill of complaint putting in issue the allegation that Sand Island is in the State of Oregon, and averring by way of affirmative defense and cross-bill that on the 19th day of June, 1908, and before any of the fishing licenses had been issued to plaintiff under which it is attempting to claim the premises in controversy in this suit, and during the time that said boundary suit was pending between the States of Oregon and Washington in the Supreme Court of the United States, and before the decision of said Court in said boundary suit was rendered, the defendants did as a precautionary measure, and for the purpose of protecting their rights in and to those certain set net fishing locations claimed by them, duly apply to the Master Fish Warden of the State of Oregon, he being the proper and only official of that State having authority to issue fishing licenses for the State of Oregon, for the issuance to defendants of set net licenses for fishing within the waters of the Columbia River, within the State of Oregon; that the necessary fees were paid to said Fish Warden, said licenses were issued to the defendants, who have held the same at all times since said 19th day of June, 1908; that said licenses were in full force and effect at all times after said date for one year, and until long after the rendition of the decision of the Supreme Court in said boundary line suit.

It is further alleged that the defendants seasonably and annually renewed their set net licenses which were issued to them by the Fish Commissioner of Washington on the 15th day of April, 1908, as described in the original answer herein, and under which their said fishing locations were taken and held prior to the attempted occupation of the fishing grounds in controversy in this suit, by plaintiff; and that said renewal licenses for the current year are now in full force and effect. The defendant's answer and cross-bill to plaintiff's supplemental bill of complaint is set out at pp. 157-162 of the Transcript.

Thereafter under the issues made up as indicated above, testimony was taken, and after trial such proceedings were had that the Court filed its memorandum decision and later its interlocutory decree, the memorandum decision being set out at pp. 166-172, and the interlocutory decree at pp. 173-178 of the Transcript.

We refer the Court particularly to the whole of the memorandum decision, as it is concise and clear in its statements; but it may be stated here that the decision in effect held that the complainant's rights as lessee of Sand Island from the United States extended to the line of ordinary low water; that under the common right of fishery, in the absence of a statute, no one has an exclusive right to fish in any particular waters of the Columbia River; that the regulation of this common right as between individuals is a matter governed by the State statute;

that it is for the State to say by its statutes what methods of fishery may be employed, and how, when and where the different individuals may fish, subject to the paramount laws of the United States for the protection of navigation; that one who complies with the statute thereby obtains a legal right to fish in the location which the statutes authorize him to appropriate, it being a necessary consequence of the right to regulate that individuals who comply with the regulations obtain a present right to hold and occupy locations for fishing purposes. It was held that the statutes of both Oregon and Washington authorize various appliances for catching salmon, among others, set nets; that they authorize the issuance of set net licenses; the necessary effect of which is to permit the licensees to locate a set net in some definite location. It was held that the defendants complied with the statutes applicable to procuring set net licenses and locating appliances thereunder; that having the State license to maintain and operate set nets defendants had the right to choose their location so as to appropriate a certain portion of the common fishery; and if they chose a location where complainant intended to operate a drag seine, but for which location it had secured no right under the State law, it was complainant's misfortune; that under the statutes of both states, he who is first in time in securing a location is first in right, and the upland owner is given no advantage as to priority over others. The Court found that the defendants, in selecting their location, complied literally with

the Washington law and substantially with the Oregon law; and that these facts, especially when considered in connection with the concurrent jurisdiction of both states on the Columbia River, gave the defendants priority over complainant, who had not complied or attempted to comply with the laws of either state. It was further held that inasmuch as the restraining order issued in complainant's behalf in July, 1908, was still in force, it had prevented defendants from continuing their possession of the location ever since, and that it must be presumed that but for the restraining order, the defendants would have lawfully continued to the present date the possession and rights which they had secured at that time.

The interlocutory decree provided that plaintiff shall take nothing by this suit and that the temporary injunction and restraining order theretofore issued upon plaintiff's application should be dissolved and vacated; that the defendants and cross-complainants were at the time of the commencement of the action and ever since have been, and now are, and until the expiration of the current license year, will be entitled to the exclusive right to construct, maintain and operate the set nets and other appliances which they had constructed in the months of June and July, 1908, on the fishing grounds in question; that plaintiff did not have, at the time of the institution of this suit, and has not, at any time since, had any right to interfere with the defendants and cross-complainants in their occupation and

use of said set nets and appliances or with the locations therefor; that plaintiff's interference therewith was without license or authority; that at all times since the commencement of this suit the defendants have had and now have the right to reconstruct, maintain and operate for fishing purposes in said location set nets and appliances of the same kind and character and covering the same area as those which they constructed as aforesaid in the year 1908. An injunction was awarded to each of the defendants and cross-complainants and against the plaintiff until the end of the current license year, expiring March 31, 1912, under the statutes of the State of Oregon. It was also provided that each of the defendants and cross-complainants is entitled to personal judgment against the plaintiff and its surety on its injunction bond, to-wit: The United States Fidelity and Guaranty Company, for damages sustained because of having been deprived by plaintiff of the use of said set nets and appliances from the 7th day of July, 1908, the date upon which the temporary injunction was issued, until the date of this decree; not, however, exceeding the sum of \$12,000.00 against said surety, its liability under its bond being limited to that amount.

The interlocutory decree further provided that for the purpose of determining the amount of damages to be assessed against the plaintiff, the cause should be referred to the Hon. M. A. Langhorne, a Commissioner of the Court, as Master *pro hac vice* to ascertain and report to the Court the amount of

damages suffered by the defendants and cross-complainants; and to that end said commissioner was authorized to consider the testimony theretofore taken in the cause, and also to take such other and further testimony bearing upon the question and amount of damages, as the parties or either of them should offer. The commissioner was also directed to report to the Court his findings and conclusions, together with any further testimony taken before him.

Thereafter further testimony bearing upon the subject of damages was submitted by both parties before the commissioner; and the latter, after considering the same, together with the testimony previously taken, filed his written report thereon, together with his findings of fact and conclusions of law. The Master's report is set out at pp. 179 to 183 of the Transcript.

The Master's report found the damages in the aggregate to be \$22,360.00, and that the three defendants and cross-complainants are equally interested in the damages and should have judgment accordingly.

Thereafter the Hon. E. E. Cushman, the judge presiding, filed his memorandum decision on the report of the Master, the same being set out at pp. 190-196 of the Transcript. The Court confirmed the report of the Master in all particulars except that the aggregate damages were found to be \$22,-083.00, instead of \$22,360.00 as found by the Master. Thereupon the Court entered its final decree

and judgment, establishing the aggregate damages at \$22,083.00, and awarded one-third thereof to each defendant and cross-complainant, making the full judgment in favor of each defendant and cross-complainant the sum of \$7,361.00, together with \$361.10 for costs, the latter amount being one-third of the taxable costs expended by the defendants and cross-complainants. The amount of the judgment in favor of each defendant and cross-complainant was also limited to \$4,000.00 as against the surety, the United States Fidelity and Guaranty Company. The final decree and judgment is set out at pp. 197-202 of the Transcript. From said decree and judgment this appeal is sought to be prosecuted by the plaintiff in the cause, the Columbia River Packers Association, The United States Fidelity and Guaranty Company not having been made a party to the appeal.

DESCRIPTION OF A SET NET.

A set net, as commonly used for salmon fishing on the Columbia River, consists of an ordinary drift or gill net of varying length, and depth, according to circumstances such as depth of water, strength of currents where the net is used, and other local conditions. The meshes of the net are of appropriate size, say, $5\frac{1}{2}$ to 11 inches, to "gill" the fish (catch them by the gills), as they strike in. The net is hung on a cork line which floats on or near the surface, and a parallel lead line which hangs near the bottom to hold the net in an upright position. The net is held across current by being at-

tached from each end to substantial buoys which float upon the surface of the water, and anchors heavy and strong enough to hold the ends in place near the bottom of the river. The fish are caught while running up stream or against the current in an eddy.

JURISDICTION.

Having effectively used the process and machinery of this Court for four years to keep appellees out of their fishing grounds and to appropriate unto itself their fish and the profits therefrom, appellant now insists that the Court was always without jurisdiction in the premises, and that its motion to dismiss the suit should have been granted, notwithstanding the cross bills and demands on behalf of defendants.

Of course, no offer is made to return the money so taken from appellees by appellant through its alleged unlawful action, or to place the parties in *statu quo*. On the contrary the effort to secure the dismissal at this time is for the very purpose of evading the Court's decree in awarding appellees some measure of compensation for the great wrongs they have suffered at the hands of the appellant.

Says Mr. Street, in his Federal Equity Practice, Vol. 1, pp. 235-6:

“The objection to the venue is personal to the individual defendant. * * * For a still stronger reason the plaintiff himself cannot raise the objection when the suit takes such a turn that it becomes desirable for him to get

out. This rule has been applied in the case of a cross bill.”

Citing:

Callahan vs. Hicks, 90 Fed. 539.

Yet, appellant uses twenty pages of its brief in an endeavor to convince this Court that it should now be allowed to go hence, immune; the real reason being that a substantial judgment was entered against it, but the alleged reason being that, subsequent to the filing of its suit and issue joined thereon, the United States Supreme Court adjudged Sand Island to be in Oregon instead of Washington. Its motion to dismiss thereafter made, being properly denied inasmuch as issues had been raised by the cross-bills, long thereafter appellant filed a supplemental bill praying again that:

“ * * * Your orator have such judgment and decree as prayed for in its original bill of complaint.” (P. 155, Transcript.)

In other words, the suit was practically begun again on identically the same theory and the injunction thereby prolonged and continued. Appellant did not require the consent of the Court to dismiss the injunction at any time, and thereby stop the further accumulation of damages; but it had no right to invoke the Court's aid to dismiss our cross bills, either then or now.

How, then, can appellant seriously contend that appellees have forced it to stay in this suit against its will, when, instead of dismissing the injunction,

appellant filed a supplemental complaint asking for the continuance of the injunction?

“It has already been stated that pure supplemental bills are but continuations of the original bill, and used as amendatory process to cure matters which render the original bill defective; but a bill in the nature of a supplemental bill is in effect an original bill, beginning, as it were, a new suit, which simply draws to itself the advantages of the proceedings under the original bill and to that extent is supplementary.

* * * * *

“A bill in the nature of a supplemental bill must, however, follow the general purpose of the original bill and be in accord with the tenor of its allegations.”

Simpkins, A Federal Equity Suit, 2nd Ed. pp. 373-4.

Since appellant's supplemental bill in effect constituted a new suit, asking for the same relief, and since the law is that although a new suit in effect, a supplemental bill must accord with the original pleading in matters such as jurisdictional averment, appellant's status is as though it never had filed a motion to dismiss; and any alleged virtue which it claims by reason of such motion is nullified by appellant's own act.

For that matter, the supplemental complaint could not have changed the original status of the case as to jurisdiction.

“The remedy by supplemental bill or by original bill in the nature of a supplemental bill is an ancillary proceeding, being dependent on the prior, or principal, suit. Consequently, jurisdiction in such suits is dependent on the jurisdiction in the principal suit. For instance, a plaintiff in a supplemental bill is not disabled from pursuing that remedy by the fact that he has (through change in situation) or could have, an adequate remedy at law. * * * The proceeding is ancillary and jurisdiction is dependent on jurisdiction in the original suit.”

2 Street, Federal Equity Practice, pp. 748-9.

Citing:

Ross vs. City of Ft. Wayne, (C. C. A.) 63 Fed. 466.

Henry vs. Travelers' Ins. Co., 45 Fed. 299, 302.

Even if the location of Sand Island were material to the jurisdiction of this suit (and it is not, at all, as will be shown later), appellant, having alleged it to be in Washington, is bound by the statement of facts as originally pleaded.

“In order to reach the bottom of the matter we may here be allowed to refer to the circumstance that the purpose of the bill is to set forth a statement of facts which, when proved, will entitle the plaintiff to relief. The statement of facts must be borne out by the proof. A bill in equity differs entirely from a declaration at law. The declaration needs to embody

only legal conclusions, and the plaintiff may ordinarily vary his allegations to make them conform to any probable state of facts he is likely to prove. He is not concluded by the recitals of his pleading in regard to points of fact. The basis of a judgment in a court of law is found primarily in the verdict of the jury. The basis of a decree in equity, on the other hand, or at least one of its bases, is found in the allegations of fact made in the bill. The plaintiff in equity is concluded by the statements of fact in the bill. As against him those facts are taken to be true."

Street, Vol. 1, Federal Equity Practice, p. 145.

Furthermore:

"Jurisdiction depends on the state of things at the beginning of the action, and subsequent events cannot oust it. The jurisdiction of a court of the United States once obtained over property by the bringing of the same within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state or by any proceedings subsequently commenced in a state court.

"If the claim to relief clearly within the federal jurisdiction is fairly made and is not fictitious or fraudulent, jurisdiction attaches although the ultimate decision may be against the right claimed."

1. Street, Fed. Equity Practice, pp. 178-9.
Citing:

Hardenbergh vs. Ray, 151 U. S. 112.

Salt Co. vs. Brigel (C. C. A.), 86 Fed. 818.

Dunn vs. Clarke, 8 Pet. 1.

Mollan vs. Torrance, 9 Wheat. 537.

Ex parte Kyle, 67 Fed. 306.

Ritchie vs. Burke, 109 Fed. 16, 19.

Rio Grande R. Co. vs. Gomila, 132 U. S. 478,
481.

Penn. Mut. Life Ins. Co. vs. Austin, 168 U.
S. 685, 695.

Louisville Trust Co. vs. Stone, (C. C. A.)
107 Fed. 309.

This suit comes squarely within the above rule. Appellant claims that it honestly averred Sand Island to be in this District, and jurisdiction being established, on the *prima facie* showing made in the original bill, it will continue to the ultimate decision and satisfaction though Sand Island be, as a matter of fact, in Oregon.

Appellant says (p. 57 App. Brief):

“* * * as we understand the law applicable to this case, the decision of the Supreme Court (of Oregon) in *Eagle Cliff Fishing Co. vs. McGowan*, is binding upon this court and is decisive of this case.”

Turning to pp. 768-9 of 137 Pacific, we find the following declaration in the Eagle Cliff opinion about this very suit:

“But, however this may be, the authority of a court to hear and determine a cause depends upon the allegations of the initiatory pleading, and not upon the facts, and an error committed in determining the jurisdiction does not usually render the judgment void; but such misconception of the question is generally regarded as voidable only. Van Fleet, Col. At. § 60. As the bill filed in the federal court of the state of Washington averred that Sand Island was within that state, and as that tribunal has general jurisdiction of the subject-matter thus involved, it will be assumed, without deciding the question, that the relief there awarded was not void.”

This principle, that jurisdiction depends upon the original allegation, and is not affected by subsequent change in the situation, or a subsequent discovery that the jurisdictional averment was based upon a mistake of fact, is quite familiar in cases where the citizenship of the parties changes, pending suit; or the amount finally determined by the Court to have been in controversy is less than required, when the complaint has alleged more.

Conolly vs. Taylor, 2 Pet. 556.

Clarke vs. Mathewson, 12 Pet. 164.

Mollan vs. Torrance, 9 Wheat. 537.

Scott vs. Donald, 165 U. S. 58, 101.

Hardin vs. Cass County, 42 Fed. 652.

Riggs vs. Clark, (C. C. A.) 71 Fed. 560.

Jones vs. McCormick, etc., (C. C. A.) 82
Fed. 295.

However, neither the past, present nor future actual location of Sand Island, nor its alleged location, is material to the jurisdiction of this suit. Furthermore, neither is the doctrine of concurrent jurisdiction, so elaborately assailed in appellant's brief, necessary to uphold the court's jurisdiction.

Appellant instituted this action in the Federal Court on the ground of diversity of citizenship, the bill setting out all the necessary jurisdictional averments for that purpose.

The bill alleges that appellant is a citizen of Oregon, duly incorporated under the laws thereof, and that appellees are citizens and residents of Washington. The amount in controversy is shown, by the rule in suits for injunction, to have exceeded by many thousands of dollars, the jurisdictional requirement of three thousand. On page 14 of the Transcript are averments in the bill of complaint that appellant had spent \$15,000 in equipment for this fishery; was expending \$200.00 a day to maintain the outfit; and \$5,175.00 per annum for rental of these premises, the total value of which fishery is alleged to be threatened with destruction by appellees' set-nets—"irreparably damaged; that the damage will amount to many thousands of dollars," etc.

"So where injunctions are sued out to prevent destruction or injury to property, the jurisdiction is ordinarily fixed by the value of the

property to be protected. But the allegations of damage, actual or exemplary, in such cases will sustain jurisdiction."

Simpkins, *A Federal Equity Suit* (2nd Ed.), p. 187. Citing Federal cases.

"Where the value of the right to be protected is much greater than the value of the property about which the dispute originated, the value of the right to be protected or the extent of the injury to be prevented fixes the jurisdiction without reference to the amount that may be recovered by law."

Idem p. 186. Citing numerous Federal cases.

To the same effect see:

1 Foster Federal Practice, Sec. 16 g.

Here we have the necessary jurisdictional averment as to amount under all three theories, to-wit: physical value of the property affected, the allegations of damage, and the value of the right claimed, the amount of its annual rental for which, appellant states as above.

There can be no question, therefore—and appellant, who made all the jurisdictional averments, is the last who should be heard to raise it—that this Court has, and always did have, jurisdiction over the parties to the suit.

This is all the jurisdiction necessary: The action was for an injunction, out of which has developed an accounting. Appellant gladly enough accepted the Court's jurisdiction—power—to maintain its

injunction for four years, but now contends, in effect, that the Court should stop there and not retain the case for the purpose of exacting a reckoning, because, forsooth, Sand Island was never in Washington, as everybody supposed, and so the injunction itself, which has enriched appellant, was wrongful and illegal.

Whether the Court had jurisdiction to issue the injunction or not (and it most certainly did have, as we shall point out), it has jurisdiction to render this accounting and award the damages found herein to belong to appellees.

Appellant will hardly contend that an accounting suit is other than transitory, and that the Court needs jurisdiction over nothing more than the parties.

Such it has always had. Now, having this jurisdiction—power—over the parties, why may it not use the same to the end that justice shall be done? Especially since the Court itself in the earlier stages of the suit, and through the suit, has been an innocent means to the end that calls for an accounting?

“A Court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter. This doctrine seems to rest on the same principles which permit a court of equity to take jurisdiction in the first instance,

because the remedy is incomplete, or to avoid a multiplicity of suits.”

16 Cyc. pp. 106 and 107, and cases there cited.

“The rule may be stated as follows: When a court of equity has rightfully obtained jurisdiction, it will retain it for complete relief though it be purely legal, as:

“First. When jurisdiction is taken upon an alleged equity which ceases before the suit ends or is dissipated by the evidence on the trial of the cause, the court will administer the legal remedy. * * *

“Second. * * * the court will administer complete relief, though, as to some matters involved, adequate relief may have been afforded by an action at law. * * *

“Third. A court of equity will take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction calls for adjudication on purely legal grounds and to confer purely legal relief.”

Simpkins, A Federal Equity Suit (2nd Ed.), pp. 27-29. Citing a long list of cases.

“There is a saying that courts of equity delight to do complete justice and not by halves. This maxim has grown out of the desire of the court completely to decide every matter involved in the litigation, so that there may be no roots of controversy left out of which other suits may spring.”

1 Street on Federal Equity Practice, p. 238.

In view of the foregoing, the judgment of the lower court appealed from here, is as valid on jurisdictional grounds as if appellees themselves had brought an original action in all respects regular, and been awarded damages for destruction of their set-net fisheries by manual force instead of by a court's injunction.

For the purpose of this appeal, from an award of damages to appellees, neither the location of Sand Island nor yet the jurisdictional power of the Court to have issued the injunction, is in the slightest way material.

THIS COURT HAD JURISDICTION TO ISSUE THE INJUNCTION
EVEN THOUGH SAND ISLAND WAS
IN OREGON.

Another familiar maxim is that Equity acts *in personam* and not *in rem*.

“The great importance of this maxim lies in the fact that it formerly (and to a great extent it is still so) determined the venue of equitable proceedings. * * * in chancery all proceedings were transitory and could be maintained wherever jurisdiction of the person was acquired. The applications of this maxim will best appear from a brief consideration of the more important equitable remedies with special reference to their venue. * * *

“(e) Injunctions — another application of the maxim now under discussion is in the granting of injunctions to restrain the commission of acts outside the jurisdiction of the

Court. * * * Thus * * a party within the jurisdiction may be enjoined from injuring real property situated outside the state. The practice of equity in this regard is not in conflict with the federal constitution.”

XI Am. & Eng. Ency. of Law 167, 173-4.

“Personal Jurisdiction and Foreign Subject-Matter. The general rule is that where a court (of equity) has jurisdiction of the person of defendant it may render any appropriate decree acting directly upon the person, although the subject-matter may be without the jurisdiction; and it may in such case compel the performance of a contract outside the jurisdiction.”

16 Cyc. p. 119.

“Equity Acts *In Personam*. This maxim embodies the principle distinguishing the process and decrees of the court of chancery and originally limiting their sanctions. It was originally the pride of the chancellors and the terror of the law judges that chancery acted directly upon the person or, as the phrase went, upon his conscience. It dealt with property but indirectly, by compelling the parties to act with relation to it. As a modern author has pointed out, there is a special sense in which equity has always acted *in rem*, in that its decrees are specific, dealing through the parties with the particular subject-matter in controversy, and not frequently awarding a recovery

out of the general assets of the parties. Moreover, the power of equity has been extended so as to permit it in some cases to act strictly *in rem*. It is unsafe therefore to consider the maxim as excluding the power of equity to deal directly with the *res*; but it is nevertheless true that equity deals primarily with the person, and usually only through him with the *res*, and such is the meaning of the maxim. While the influence of this principle affects the entire exercise of the chancery jurisdiction, its most important modern application is perhaps in permitting a court having jurisdiction of the person of defendant to adjudicate with reference to a subject-matter beyond the reach of its process, and by personal decree to require action concerning it. A more special application is in sustaining the power of a court to order a foreclosure and sale of the entire mortgaged property, although a large portion thereof lies out of the court's territorial jurisdiction."

16 Cyc. p. 134.

"In the vast variety of equitable remedies, there are, of course, some which directly affect the person of the defendant, and require some *personal* act or omission on his part, and these are still enforced, and can only be enforced, *in personam*. In regard to all other classes, the statutes of our states have, as a general rule, either made them operative *per se* as a source of title, or as conferring an estate or

right, or have given the requisite power to certain officers to carry them into effect. This modern legislation has not, however, deprived a court of equity of its power to act *in personam* in cases where such an effect is necessary to maintain its settled jurisdiction; as, for example, where the parties being within its jurisdiction, the subject-matter of the controversy, whether real or personal property, is situated within the territory of another state or nation.”

1 Pomeroy's Equity Jurisprudence, Sec. 136, pp. 154-5, citing cases.

“One of the marked characteristics which distinguish equity from the common law, is that, while the latter, as a general rule, acts against and exercises control over property alone; has but a very limited and merely incidental power, mostly borrowed from chancery, to enforce obedience to a personal command, its procedure being founded upon the theory that the parties to an action owe no obedience to the court; and is consequently restricted in its operation when the property which is the subject of a contention is beyond the reach of its process; equity acts directly against and exercises complete control over persons, and does not lose jurisdiction when the parties are subject to its process, because the property over which it thereby assumes control is beyond the territory under those laws whence its own power is derived.”

1 Foster Federal Practice, p. 2.

Citing:

Massie vs. Watts, 6 Cranch. 148.

Muller vs. Dows, 94 U. S. 444.

Carpenter vs. Strange, 141 U. S. 87, 106.

“An injunction can be made operative beyond the territorial jurisdiction of the court. Thus, if the party enjoined is within the jurisdiction, he is bound to obey the injunction, though it relates to the doing of some act abroad, such as the conveyance of land or the institution of a suit in a foreign court. Since the injunction operates *in personam*, it is immaterial, in a case where personal control over the defendant is alone desired, whether the subject-matter of the suit lies within the jurisdiction or not.”

3 Street, p. 1392.

Citing:

Cherokee Nation vs. Georgia, 5 Pet. 79.

Cole vs. Cunningham, 133 U. S. 116.

See also:

22 Cyc. p. 906.

Phelps vs. McDonald, 99 U. S. 298.

Appellant says (p. 40 App. Brief):

“That the pending case is of a local character, the decisions and authorities cited in the arguments heretofore made, clearly show.”

Said authorities are:

M. & M. R. R. Co. vs. Ward, 2 Black 485, which held the abatement of a public nuisance

—a mandatory order for the removal of bridge piers—to be *in rem*, and hence local.

North Ind. R. R. Co. vs. Mich. Cent. R. R. Co., 15 How. 233, holding that where the subject-matter involved title to real estate and a charter from a state, the suit was local in character.

Ellenwood vs. Marietta, 158 U. S. 105, which is distinguished in *Stone vs. United States*, 167 U. S. 178, as follows (p. 182):

“1. It is contended in behalf of *Stone* that as the lands from which the trees were alleged to have been unlawfully cut are in Idaho, the action is local to that State, and the District Court of the United States for the District of Washington was without jurisdiction. *Ellenwood vs. Marietta Chair Co.*, 158 U. S. 105, is cited as an authority for this proposition. But that case proceeded upon the theory that the allegations of the petition, at the time it was tried, presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only, and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass,

but for the value of the personal property so converted by the defendant.”

We repeat that the subject matter of this suit is not local but transitory, simply involving the court's jurisdiction over the parties for the purposes, first, of ordering appellees to refrain from constructing their set-nets as contemplated; and second, of exacting an accounting from appellant to appellees for the damage done. The court in this action does not need the power to extend its process to the locality and by its own officers remove a structure already standing, as would have been necessary in *M. & M. vs. Ward*. Nor is there any question of title to real estate in or charter from another state, calling for local adjudication, as in the North Indiana R. R. Co. case. Nor yet is there issue over trespass upon land, as in the Ellenwood case; the gravamen here being injury to a claimed incorporeal right, which is as we contend, transitory and can be litigated wherever the process of the court can reach the parties.

So, this being a transitory action—an equity suit purely *in personam* and in no way whatsoever dependent upon the situs of the subject-matter—this tribunal, with all parties to the suit regularly in court, has full jurisdiction to try and dispose of all the issues involved.

APPELLANT DOES NOT DISTINGUISH BETWEEN JURISDICTION AND VENUE.

The sole theme of appellant's jurisdictional contention is that this suit should have been brought

in the Federal Court of Oregon instead of the Federal Court of Washington. The Court's "jurisdiction" is not attacked on any other ground. While jurisdiction—power—cannot be maintained by estoppel, venue—the forum—can be; and appellant having itself chosen the court, as it had the privilege of doing, will not now be heard to object to the decree because of the Court's alleged lack of power to enter it. Suppose the Court did lack the power to maintain the injunction: it does not lack the power to recall it and award these damages, the parties all being within its jurisdiction, or power.

What would become of the right of counterclaim, if a plaintiff, beaten in the final judgment, could repudiate the whole suit and get out from under, by claiming that he made a mistake of judgment and should have tried his luck in some other forum? A court of equity, especially, which "delights to do justice and not by halves," is hardly so constituted as to entertain appellant's peculiar request.

A defendant, even, who might have objected in the beginning, cannot raise the question of venue after having pleaded.

"If a suit is of such nature that it can certainly be brought in some federal court or another, that is, if the subject-matter of the suit or the character of the parties is such that a federal court of some state or district has jurisdiction to entertain it, then the question whether that suit should be brought in one par-

ticular state or district rather than in another is not a question of jurisdiction at all. It is rather a question of venue, using this word in the sense of the civil division from which the jury must be gathered and in which the cause, if an equity one, should be tried. True, the term jurisdiction is frequently used in this connection and as a result some confusion has appeared in the cases. But the higher courts, and especially the supreme court, have constantly insisted on the distinction between the question of essential jurisdiction and the question of the mere place of bringing suit. As commonly put, the distinction is one between essential jurisdiction on the one hand and an exemption from process on the other."

1 Street on Fed. Equity Practice (228-9).

"The reader will note that the term venue has not been generally used in bringing out the distinction in question, but there seems to be no good reason why it should not be. In the sense in which we now use the word, it may be said that the question of venue and the question of jurisdiction are wholly different and distinct. The question of jurisdiction goes to the power of the federal court to entertain and determine the suit. The question of venue is concerned only with the matter of the particular district in which suit should be brought. The first is a question of power. The second is rather a question of practice. Jurisdiction can-

not be conferred by the consent of the parties and the want of it cannot be waived. The venue is a matter of personal privilege and can therefore be waived by the party concerned."

1 Street on Fed. Equity Practice (230).

"Similarly a plea or answer to the merits waives any objection that could be taken in respect to the district in which the suit is brought, and of course an objection to the venue cannot be raised after trial and judgment on the merits, either in the court where the trial took place or in the appellate court."

1 Street on Fed. Equity Practice (232).

"For a still stronger reason, the plaintiff cannot himself raise the objection when the suit takes such a turn that it becomes desirable for him to get out. This rule has been applied in the case of a cross bill."

1 Street on Fed. Equity Practice (236).

CONCURRENT JURISDICTION.

If there be any doubt as to the application of the doctrine of concurrent jurisdiction generally, as an original proposition, or as an academic question in this case, we respectfully refer to Judge Donworth's able and comprehensive opinion on the points raised by appellant, which contains a complete answer thereto. (Tr. pp. 166-172. 172 Fed. 991.)

We have not reviewed the authorities on concurrent jurisdiction, because we do not deem such jur-

isdiction necessary to sustain adjudication of the issues in this suit. However, we assert that such jurisdiction does attach, as Judge Donworth's opinion shows.

To summarize, jurisdiction attaches in this suit because:

1. The Court has jurisdiction over the parties and concurrent jurisdiction over the situs.

2. The Court has jurisdiction over the parties and jurisdiction over the situs because of the averments in the complaint.

3. The Court has jurisdiction over the parties for a prohibitory injunction, which acts only *in personam* and needs no jurisdiction over the subject-matter.

4. The Court has jurisdiction over the parties for a transitory action for damages.

5. As the Court has jurisdiction over the parties, complainant is estopped to question the validity of its decree because of the venue.

THE STATE BOUNDARY LINE.

When this suit was brought, and for many years prior thereto, there was no question in the minds of any of the people, both public officials and laymen, in Oregon and Washington, that the *locus in quo* was within the territorial limits of the State of Washington. The Oregon officials conceded the jurisdiction to Washington, and the Fish Commissioner of the latter State had habitually issued fish-

ing licenses for the territory. Such licenses were recognized by the Oregon officials.

The suit was predicated upon the theory that the premises were in Washington, and the answer was upon the same theory.

This situation is emphasized by the supplemental bill.

So far as the merits of this controversy are dependent thereon, it is not material whether the premises are within the boundaries of the one state or of the other. We do not, however, desire to waive our contention that the evidence in this suit clearly shows that, under the decision of the Supreme Court, in the Washington-Oregon boundary line case, the fishing locations in controversy in this suit are now situated within the territorial limits of the State of Washington.

The Supreme Court decision fixed this river boundary as:

“* * * the center of the north channel, changed only as it may be from time to time through the processes of accretion.”

211 U. S. p. 136.

We therefore have an indefinite, roving line, controlled by the daily fluctuations of the shifting sands of a mighty river.

The undisputed evidence in the case at bar shows that the so-called north channel no longer exists to the northward of Sand Island, but has entirely shifted its waters and course to the southward of Sand Island, the territory to the northward of

Sand Island having shoaled up by accretion to such an extent that at ordinary low tide a man can walk from Sand Island to the Washington shore proper. There is now absolutely no channel to the northward of Sand Island, and therefore, under the rule of the Supreme Court decision, it is proper to show that the state boundary has shifted by the process of accretion from the old north channel to the new channel southward of Sand Island.

Plaintiff opened up this question with its first and principal witness, Mr. Hawkins. We quote from the transcript, Vol. I, pp. 206-7, as follows:

“* * * I am acquainted with Sand Island at the mouth of the Columbia River and have been acquainted with it for about thirty years. That there is and has been during that time only one island at or near the mouth of such river and it has always been called or named Sand Island, and I know of no other island in the river bearing such name. I could not tell its acreage. I should say at the present time it is about three miles long and about one and a half or two miles wide. It is considerably larger than it was when I first knew it. It has moved and the sand has washed up and accumulated on all sides and it has grown in length and width. I do not think the main body has moved since I became acquainted with it. I think it has just merely added on. The witness was then handed Plaintiff's Exhibit 'A,' hereunto attached, and he stated that the island

is much larger now than it was then, but that it is the same island that is involved in this suit; that the island has moved further north and is more extensive. That formerly the main channel of the Columbia River was north of such island, and when I first came here all of the ships came in on the north side of the island, and since that time the channel has changed to the south side. I am acquainted with Sites numbered 2 and 3 mentioned in Plaintiff's Exhibit 'E,' as indicated by the map attached thereto; that the map delineated thereon is the map of Sand Island, and that the Sites numbered 2 and 3 on such map are the seining grounds covered by the lease from the United States to the plaintiff. I have been acquainted with these sites since they have been laid out and for some time prior thereto."

Other witnesses explained the shoaling and shifting and disappearance of the old north channel in more or less detail, so that, as far as this case is concerned, there can be no reasonable doubt under the rule laid down by the Supreme Court that the center of the old "North Channel" is now to the southward of Sand Island. Sand Island, gradually making to the northward, has crossed and filled the channel and forced its waters to the southward.

See also:

Testimony of E. A. Coe (showing photographs), Transcript, pp. 231-234;

Testimony of J. F. Ford (showing photographs), Transcript, pp. 234-237;

Testimony of G. B. Hegardt (the Government Engineer), Transcript, pp. 237-253;

Testimony of H. S. McGowan (and photographs, especially Exhibits 16 and 17), Transcript, pp. 253-255, 270-273; and various charts and maps introduced as exhibits.

The Supreme Court recognized the great difficulty in arriving at a correct conclusion as to the true boundary line in this case; and in closing its opinion denying the petition for a rehearing, offered and suggested the following statement and procedure:

“It must be borne in mind that an inquiry of this kind is attended with much difficulty. Here is a river of great width, three miles or so at certain places, whose bed is largely of sand, and whose channels have been naturally affected by the flow of the water, and also of late years by the jetties constructed by the Government in order to facilitate navigation. Congress, evidently recognizing the difficulty which attended the location of the exact boundaries, provided that the States of Washington and Oregon should have concurrent ‘jurisdiction in civil and criminal cases upon the Columbia River.’ Yet this provision does not determine the boundaries between the two States, and has proved insufficient to settle the disputes between them

as to things done upon the Columbia River. *Nielsen vs. Oregon*, 212 U. S. 315.

“We may be pardoned if, in closing this opinion, we refer to the following:

‘Joint Resolution to enable the States of Mississippi and Arkansas to agree upon a boundary line and to determine the jurisdiction of crimes committed on the Mississippi River and adjacent territory.

‘Resolved by the Senate and House of Representatives of the United States of America in Congress assembled: That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi River now, or formerly, formed the said boundary line and to cede respectively each to the other such tracts or parcels of the territory of each State as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Mississippi River.

‘Approved January 26, 1909.’

“Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the States of Washington and Oregon whether it will not be wise for them to pursue the same course, and with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two States and their respective jurisdiction.”

Washington vs. Oregon, 214 U. S. pp. 217-218.

Thus it is clear from this latest expression of the Supreme Court in the boundary line case itself, that the two States should agree and settle between themselves the jurisdiction to be exercised by the respective States. This is just what had long been done by common consent and practice prior to the bringing of this suit and until after the injunction was issued. Appellant's supplemental complaint states positively that Oregon recognized Washington's jurisdiction and that Washington assumed it. (Tr., p. 154.)

RIPARIAN RIGHTS.

Appellant's brief has much to say about the riparian rights of shore-owners. What are “riparian rights”? Farnham on Waters—said by appellant to be “the latest work on this subject”—defines and discusses riparian rights in Vol. 1, Sec. 62, where we find the term to cover: (1) The shore-owner's

“right to have the water remain in place, and to retain, as nearly as possible, its natural character,” preventing obstruction or pollution of the waterway; (2) Shore-owner’s right “to have his contact with the water remain intact, * * * known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream, * * * subject to several limitations, however”; (3) The “right to preference in case the land under water is sold, * * * accretion, * * * and the preferential right to fill out into the waters if such filling is permitted by the public”; (4) “Use of the shore immediately adjacent to the land belonging to the public,” i. e. the use of the tide-lands (between high and low water) while the tide-lands are still public property, which gives “the preferential right to secure ferry franchises and the right to draw nets onto his shore”—across said tide-lands; also (5) “Free use of the water space immediately adjoining his property for the transaction of such business as may be necessary in connection with wharves or structures erected by him,” for example, preventing vessels from anchoring “in such a way as unreasonably to interfere” with his “wharves or docks,” or “destroy his access to the water.”

None of appellant’s authorities on riparian rights holds that the shore-owner, as such, has a right to keep the space beyond his low-water mark clear from all obstructions, or indeed from any obstruction unless the same be shown to interfere with the free use of his wharf, the erection of which is a

special easement across the public waters to the line of navigation; or unless the obstruction unreasonably interferes with his access to the water.

The only right of a riparian owner, as such, beyond low-water mark, is access to his wharf if he has built one, or access to the edge of the water itself if he has not built a wharf. Any private right beyond low-water mark is contingent upon his having built a structure below such line. If not, his right of access is confined to the edge of, and not through, the body of the stream.

Once beyond the low-water line, his right of ingress and egress is not that of access at all (“access” to the water being the peculiar right of the riparian owner), but is his common right with the public at large, to enjoy free navigation.

The riparian owner’s right of access is the same as an adjoining owner’s right of access to any highway. Once on the road, his right is public, and not such as flows from the mere fact that his property abuts the same. A stranger has all the privileges in the road itself that an adjoining property owner has.

Moreover, if the stranger be licensed to erect a structure in the street which does not obstruct the land-owner’s access to the street, such stranger cannot be enjoined from maintaining a private nuisance. The abutting owner’s property right as such does not extend into the street, so he cannot enjoin a structure on that theory.

Here, the river below low-water mark is the high-

way. Appellant's shore ownership gives access to this highway but not rights on the highway. Rights on the highway are public, which are not concerned with one's private right of access to the highway.

Appellant cites many cases to show that access to the water is a riparian right. But that is not denied. What is denied is appellant's contention that "right of access" means more than it says, to-wit: Right of approach or admittance, merely. (See Webster's New International Dictionary.)

Because it leased these shore-lands to drag-seine the river in front of them, appellant claims that this proposed use of the water cannot be interfered with, its "riparian ownership" giving it such a property right in the river as to exclude all whose mode of operation might conflict therewith. Had the shore-land been bought or leased for a summer-resort, intending the view from the hotel to be unobstructed and the fairness of the landscape unmarred by piling or apparatus, has the shore-owning hotel-proprietor such private right in that deep water as to enjoin a fish-trap or set-net, licensed by the state, because the fish-trap or set-net interferes with the inn-keeper's private use for the public marine highway?

Is there a distinction? The point is: Appellant claims that "riparian ownership" carries with it such private property rights out in the public highway as to enable one to stop another from a licensed vocation in said highway, because the shore-owner wants to keep it clear for his own private purpose.

Appellant's authorities do not say that "right of

access" itself extends below the low-water line. Had appellant built a wharf, it is conceded that a passageway from the channel to such wharf would have to be maintained as an incident to his special easement. But in the absence of this contingency, riparian (i. e., peculiar or private) rights stop at the low-water mark.

Appellant's injunction is predicated upon the theory that appellees' structures are a trespass upon its private property rights. Private property rights do not exist below low-water mark, except in the one case of an easement for a wharf. But even then, the easement does not embrace a right to keep a stretch of seven thousand feet absolutely unobstructed, as appellant here has done, even without such easement.

EXCLUSIVE FISHERY.

Realizing the untenability of its claim in the lower court that its shore-ownership gives appellant an exclusive right of fishery in the river, counsel tries to drop that broad contention in his appeal brief and now avers that he never did make it; yet with the same breath re-iterates it time and again. Let us see how.

Two physical things cannot exist in the same space at the same time. If one is to have continuous occupancy, the other must give way entirely. If two modes of fishing so conflict as to stop each other, the question arises as to which of the two shall prevail; in other words, which shall exclude the other; for exclusion is the inevitable result. No amount of spe-

cious reasoning about other modes of fishing not under discussion here, can alter this fact. Why not as well argue that the fishery is not exclusive because appellees could have built a fleet of aeroplanes to hover over the water and catch salmon by hook and line or by nets dropped from above?

Between two irreconcilable modes of fishing one must be exclusive as to the other. Appellant's drag-seines exclude appellees' set-nets, or *vice-versa*. Appellant recognized this fact and acted upon it by tearing out appellees' apparatus three times, then by injunction appropriating the site and excluding appellees therefrom; in short, set up an exclusive fishery, which by its bill of complaint it asserted its right to do. (Transcript pp. 4-16.)

We do not aver that an exclusive fishery for a limited period is not possible; on the contrary, we assert that it is the commonest sort of salmon fishery in these states. Indeed, the appellees themselves are the ones entitled to an exclusive fishery here, since appellant's apparatus (drag-seines) by nature cannot be operated where set-nets are located. If appellant used drift-nets, for example, appellees' set-net locations would not necessarily be exclusive. As between the parties to this suit the fishery maintained by appellant was exclusive in it.

How then is an exclusive fishery created? By license from the state to fish by a certain method at a certain location. True, the shore owner, or anyone else, has a common right to drag seines in front of a given locality—the owner having this single advan-

tage over the stranger, that he can step from the water onto his own beach. But after the state has licensed a fixed appliance in front of that spot, any seining must be subordinate to the right of the licensed appliance to remain in place. And if such seining cannot continue without removal of the licensed fixture, the seine must give way. Any other rule would deny to the state the power to regulate its own fisheries.

Under appellant's contention, no fish-trap or set-net could exist in either Washington or Oregon, because the shore-owner could always claim the right to use the water for seining and that his special property in that water gave him the privilege of enjoining anything which interfered with that intent. And so licensed citizenship must give way to unlicensed force and violence of shoreland ownership, as was manifest when appellant invaded appellees' licensed fishery and destroyed the moorings on same three times. The plenary power of the state to manage its own fisheries as has been taught to its residents and citizens by a century of American jurisprudence, becomes lost in the revised chapter on "riparian rights" by opposing counsel.

THE EAGLE CLIFF CASE.

Contending that the case of *Eagle Cliff Fishing Company vs. McGowan* is binding upon this Court, counsel for appellant, after discussion of the points there involved (omitting, incidentally, to note its distinguishing feature from the case at bar); quotes

from the opinion of Judge Moore, and draws this conclusion (pp. 59-60, Appellant's Brief):

“The Supreme Court of the State of Oregon held that the licensee (lessee?) of the United States to Sites 1, 2 and 3, on Sand Island, was entitled of right to the free and unobstructed ingress to and egress from such shore to the navigable channel of the river, for the purpose of hauling and landing seines from the water, and for the purpose of launching the same from the shores into the water, and that under the laws of the State of Oregon, one armed with a license to operate a set net or fixed appliance was not authorized to erect or maintain one in front of such tide-land owner.”

As we read the record in that case, the point at issue must have been whether the set-nets there in controversy were constructed according to law; not, as here, whether they may be constructed at all.

Appellant says (p. 59, App. Brief):

“The Eagle Cliff Fishing Co. claimed that it was the owner of the shore and tidelands, and as such owner, as an incident thereto that the private right of access to every part of the water bordering thereon the navigable channel of the river, and that this was property right and could not be taken from it without due process of law. This is precisely the claim made by the appellant in this suit.”

Yet, on this point, the opinion says (p. 61, App. Brief):

“Though the right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state, the tideland owner on such a stream has the exclusive right to draw a seine on his own land. *Hume vs. Rogue River Packing Co.*, 51 Or. 237, 244, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732. While in the case at bar the sole privilege thus adverted to is held by the plaintiff in consequence of its possession of the demised premises, which right is undoubtedly of great advantage in landing salmon entrapped by a seine, such lawful occupant of the sites mentioned is not entitled to, and cannot exercise at such place, any prerogative in the manner of catching such fish differing from that which can be legally asserted by every other citizen of the state. *Hume vs. Rogue River Packing Co., supra.*”

In other words, the Oregon Supreme Court declares that the shore-owner's special privilege is (as we have before pointed out) confined to the shore itself, his right to fish beyond the shore differing not “from that which can be legally asserted by every other citizen of the state.”

Appellant informs us that this means “as such (tideland) owner, as an incident thereto” appellant had “the private right of access to every part of the water,” that privilege giving, in Oregon (p. 65, App. Brief), “the right to enjoin the placing of set nets

in front of his shore and the line of navigability of the navigable waters fronting thereon.”

Hume vs. Rogue River Packing Company, 92 Pac. 1065, cited by Judge Moore as a statement of the law in Oregon, holds (p. 1068):

“By the law of this state, as declared and established by this Court, the owner of upland bordering on navigable water has no title in the adjoining lands below high-water mark, nor any rights in or over the adjoining waters as appurtenant thereto. *Hinman vs. Warren, supra*; *Parker vs. Taylor*, 7 Or. 435; *Parker vs. Rogers*, 8 Or. 183; *Shively vs. Parker*, 9 Or. 500; *McCann vs. Oregon Railway Co.*, 13 Or. 455, 11 Pac. 236; *Bowlby vs. Shively, supra*.”

If the Eagle Cliff decision follows this settled law of Oregon (and it professes so to do, in the extract quoted above), then there can be but one possible ground upon which the court based its decision, to-wit: That the facts were such as to sustain the injunction as a matter of public policy, and not private trespass, as appellant would have us believe.

Nor do we see anything inconsistent with this in the opinion, for the Court states positively that plaintiff has no private rights beyond the shore-line as an incident to its riparian ownership; and, on the other hand, reaches its decision in these words (p. 64, App. Brief):

“It is believed that the obstructions placed by the defendants in the Columbia River were not authorized by statute, and that they tended

to create an exclusive right of fishing, the continuance of which was properly enjoined."

No fishing statute affecting a shore-land owner is involved, one very good reason being that there is none in Oregon applying to shores of the Columbia River. Though plaintiff there, like the appellant here, urged its common-law riparian rights as a basis for its injunction, the Court allowed it upon statutory grounds instead; so that, as affecting appellant's contention here that it has a common-law private property right in the river, the Eagle Cliff decision is not in point.

The Court cites Oregon statutes authorizing and licensing set-nets, and does not question their validity. There is no suggestion even that these laws are void, as they must inevitably be if the shore owner can, to suit his personal whim, set them aside.

The opinion itself therefore expressly recognizes that the shore owner, as such, has no private or property rights in the water, and that set-nets as such are quite legal. What is left, then, on which to base the decision but the belief that the appliances were themselves so constructed as to be an unlawful interference with the rights of fishery? Appellant says the facts are identical; but not if we are to take the averments in the Eagle Cliff bill of complaint as a statement of the facts in that controversy.

In the case at bar, the record shows that appellees' buoys were one hundred feet or so from shore and several hundred feet apart (Tr., 228, 349), leav-

ing between each location a clear space of at least four or five hundred feet in front of the shore, and, beyond the outer buoy of each set, the entire river, unobstructed. This was ample room for the navigation of the largest ocean vessels in to appellant's shore—had such use been contemplated—and for every other reasonable purpose, including drift net fisheries. The only use of the waters to which appellees' set-nets might be considered an obstruction would be such use as requires that no obstruction whatsoever be imposed, even a pile or an anchored vessel. The "right of access" never contemplated such a monopolistic interest in a shore-owner.

The complaint in the Eagle Cliff case sets forth, with particularity, the construction of the set-nets, alleging Paragraph VII, (Abstract of Record, *Eagle Cliff Fishing Co. vs. McGowan*, p. 13):

"That said obstructions are about twenty in number and are placed in the waters of said river about twenty-five to fifty feet from the shore and about from one to two hundred feet apart and strung along the entire shore of said sites 1, 2 and 3, and the said defendants also have laid and anchored a cable in front of site numbered, running along the entire front thereof and have anchored the same with two large anchors in the bed of said river close to the ordinary low water line. That said stones and anchors aforesaid were large and of great weight and are so placed that plaintiff cannot possibly operate its seines in the waters of said

river and cannot land its seines, or either thereof, on the shores of said sites 1, 2 and 3, and wholly prevent the plaintiff from operating seines on said lands and exclude the public generally from operating gill nets, drift nets and seines in the waters of said river.”

The Supreme Court seems to have considered such to be the case, for it holds “the obstructions” to be of a kind unauthorized by statute—not set-nets as a class but these particular structures; the statutes that authorize set-nets not contemplating a cable stretched along the entire front of appellant’s site twenty-five feet from shore, preventing access to the water and so built as to exclude the public generally from the operation of “gill-nets, drift-nets and seines.” Such construction, the Court says, “tended to create an exclusive right of fishery [excluding every other kind], the continuance of which was properly enjoined.”

Moreover, it is not unreasonable to suppose that a cable stretched along the entire shore line and but twenty-five feet out from it, cuts off one’s riparian right of access, as a fence or rope extended in front of one’s lot and but a foot or two away might be deemed an obstruction of access to the street. But right of access to the street or the water does not carry with it a property right in the street or the water. The street belongs to the municipality and the water and its contents to the State, as the owner of the bed under the water.

As it nowhere appears in the case at bar, that

there was any obstruction within a hundred feet from shore, or at all between the shore and the opposite side of the river, except by intermittent buoys several hundred feet apart, it cannot be said that appellant's access to the water, or for that matter clear across the water, is unreasonably interfered with, as the Court found it to be in the Eagle Cliff case.

Appellant insists that right of access means right to keep the river absolutely clear for its particular private purpose; but the authorities, especially in Oregon, do not support such a contention, nor is there any statute to that effect.

Counsel takes the firm stand that right to drag seines across the shorelands carries with it right to go out and fill up the seines also. We submit that this is an unwarranted assumption. The right to manipulate the seines on the public water is purely a public franchise subject to the will of the State, and in no way whatever related to the right of walking and dragging on the dry land. This distinction could not be more clearly stated than Judge Moore himself has stated it in the extract above quoted. Appellant itself admits that appellees could drag-seine the river as a public right if they landed the fish on a boat instead of trespassing upon the shore land.

Furthermore, appellant at the time this suit was begun had no Oregon licenses to operate a drag-seine or any other fishing appliance on this site, nor to operate this particular drag-seine upon any site.

If, as counsel insists, the Oregon fish laws govern, then appellant was itself guilty of unlawful fishing there. The Oregon statutes require licenses for drag-seining, whatever riparian rights a shore-owner may or may not have; and provide for seizure and confiscation of seines thus unlawfully used. B. & C. Code, Secs. 4060, 4089, 4090, 4093, 4111.

Is this Court to accept the astounding doctrine here asserted that a shore-owner, because he owns the land touching upon the water, can ignore all the fish laws of the State and set up an exclusive fishery as a property right—disregarding all regulations and penalties—and further yet can dictate that the State shall not authorize anything under its own laws which interferes with his purposes?

This doctrine stated conversely would be: No sort of stationary gear can be authorized by the State, even though a license has been issued therefor. Only gill nets and seines may be used; except by and with the advice and consent of the shore-owner, who is required to take no license of any kind to operate such fishery as he may choose.

Why bother about licenses at all, when by owning a strip of shore-land, one may dictate to the State itself what disposition to make of its fisheries? Logically it must follow that the shore ownership carries with it the exclusive right of fishery as a property right and the fishery statutes are mere baits to catch gudgeons. What right has Oregon to collect annually licenses for hundreds of set-nets and traps if shore-owners may prohibit their operations?

It is manifest that counsel expends these efforts to induce this Court to accept such a doctrine, in order to cover up the fact that appellant had no legal right by way of franchise to maintain this fishery. Having ignored all the fish laws of the State, counsel would make this Court believe that it had a “property” right superior to that of the owner of the fishery itself, the sovereign State.

If, therefore, the Eagle Cliff decision holds, as appellant contends it does, that the right to walk upon one’s land with a seine guarantees the right as well to fill the seine with fish from the water in front thereof, without license to fish, not to mention a right to exclude every structure in the body of the river that is legally licensed, then we submit that the Court was entirely wrong and disregarded the law as plainly stated by itself. Counsel’s interpretation of this decision cannot possibly be correct, unless the Oregon Supreme Court is to be left open to the criticism of stultifying itself and openly so proclaiming.

The logical result of such a decision would be to hold any duly licensed set-net unlawful if erected in front of any shore; judicial legislation nullifying all the statute laws in Oregon authorizing set-nets, and making the State the party to a fraud when it accepts money for a license to do what it cannot permit to be done.

The State has already assumed, correctly, that a shore-owner has no private right to enjoin a set-net, for by legislation, it attempted specifically to

grant that right in the Rogue, Willamette, Umpqua, and other designated rivers, not including the Columbia (Sections 4072 and 4073 of B. & C. Code, passed in 1899 and 1901, and declared unconstitutional in *Hume vs. Rogue River Packing Company*, 51 Or. 237). Why was this necessary, if the right existed at common law? The statutes authorizing and regulating set-nets were all passed subsequent to the above attempted inhibition (and before this cause of action arose), as follows: B. & C. Code, Section 4076 (1905), Sec. 4090 (1901), Sec. 4098 (1905), Sec. 4093 (1905) and Sec. 4115 (1905); L. O. L., Sec. 5259 (1903).

The fact that the legislature limited its proposed grant to these rivers shows quite conclusively that it did not intend to make the right general. The State has full power to create trap and set-net fisheries, even to the exclusion, perchance, of drag-seine fisheries. Not the common-law of riparian ownership, but the sovereign state as proprietor, through its legislative enactments, determines the nature of any fishery right in the waters which it owns. All fishery rights are mere franchises, not property (with the single exception of where the entire bed, as in a fish-pond, is privately owned); and the State has plenary power to say what those franchises shall be, and how they may be exercised.

It has said that the franchises may be for fixed appliances such as set-nets, to the possible exclusion of drag-seines, if such franchise be, as in the case at bar, prior in point of time. Were this not so,

how could a set-net be possible, a fixed appliance by nature, as the name implies? Both states by their licenses gave this franchise to appellees to erect and operate for the entire season, this fishery that couldn't exist without being fixed. Subsequently, appellant obtained a Washington license only to drag-seine in front of its shore, which it could have done without question were the way clear, and the site in Washington. But shore-ownership and junior franchise combined (not to mention shore-ownership alone, if as appellant insists, the Oregon laws govern) cannot enable it to make the way clear, when the State has seen fit to ordain something else. Appellant always has the privilege of drag-seining if it can do it. So has a shore-owner on the rock-jagged coast of Cape Flattery the privilege of drag-seining. But the State is no more concerned about the legally erected obstruction here than it would be there with the natural obstruction of sharp rocks. So far as the State's franchise could make it, appellees' set-nets changed the physical contour of the river-bed, and appellant could not exercise its license to drag-seine for the same reason it couldn't if large boulders instead stood in the way. Nor should appellees be any more liable for this limitation than the State for a natural barrier: a license to drag-seine, nor yet a riparian right to walk on one's shore, carries with it no right to demand either that the State blast out the rocks or that it remove a set-net located under its prior valid franchise.

As stated, then, the point for this Court to decide

is whether appellees could, properly licensed, erect any set-net whatever on this site; and not, as in the Eagle Cilff suit, whether the set-nets were properly constructed. The method of construction is not in issue here; but instead the right itself.

OTHER CASES CITED BY APPELLANT IN SUPPORT OF ITS
RIPARIAN RIGHTS THEORY.

Appellant cites *Hume vs. Rogue River Packing Company*, 51 Or. 240 (92 Pac. 1065) as supporting its riparian theory. We refer this Court to the opinion itself and assert that on the contrary the decision was that a riparian owner has no right by common law, by statute, or by prescription to an exclusive fishery in front of his shore lands; and that such shore ownership was no basis in law for enjoining a set-net. The suit was by a riparian owner, claiming as such the right to enjoin the defendant from trespassing upon the plaintiff's alleged fishery, by fishing in the waters in front of the plaintiff's shorelands. The trial court, Judge Hamilton presiding, dismissed the complaint and the Supreme Court of Oregon affirmed the decision in an exhaustive and well reasoned opinion. The court further held that a statute of Oregon which had attempted to grant to shore owners the exclusive right of fishery in front of their lands upon the shores of the Rogue and other rivers, was invalid and unconstitutional.

Yet appellant's counsel at pp. 56 and 57 of his brief says of that case as follows:

“In the case of *Hume vs. Rogue River Packing Co.*, 51 Or. 240, the lower court held that

Mr. Hume, as a riparian owner, had the right to complain against and enjoin a set-net location exactly similar to the set-nets sought to be placed in front of plaintiff's premises here, placed in front of Mr. Hume's tide lands between ordinary water mark and the navigable channel and same were a private nuisance, as to Mr. Hume, and an injunction was issued."

Why does counsel make such a statement to this Honorable Court? We are at a loss to understand how counsel of eminent standing can make a statement so at variance with the fact. We shall not entertain the thought that he intended to mislead this Court, yet the statement unchallenged would certainly have that effect.

We desire to be charitable and find some reason if we can for such an extraordinary statement to a tribunal of this character. The only reason we can fathom is that counsel had in mind the case which he next cites, *Hume vs. Turner*, 42 Or. 202 (70 Pac. 611); yet of that case he simply said that it supports the doctrine of the Rogue River case, and then adds that: "The rule here contended for has become a part of the jurisprudence of Oregon." Examining the context of the brief at the pages above mentioned, it requires a far stretch of imagination to conclude that counsel made the mistake in his references which we suggest, but if he did not labor under a pure mistake, then he surely does not understand what *Hume vs. Rogue River Packing Company* decides. Assuming that counsel's statement

was intended to refer to *Hume vs. Turner*, which was decided five years before the Rogue River case, then we have to say of the Turner case that whatever may have been said in that case the later decision, *Hume vs. Rogue River Packing Company*, said of it as follows:

“* * * Plaintiff also relies with a good deal of confidence upon what was said by this Court in the case of *Hume vs. Turner*, 42 Or. 202, 70 Pac. 611. What was said there amounts to no more than a recital of the facts and issues before the lower court, and the relief granted by that court, from which the conclusion was deduced that the plaintiff in that case, who is the plaintiff here, and who had appealed, had obtained by the decree all of the relief asked by him, and for that reason he was not aggrieved by the decree of the trial court. Hence he had no right of appeal, and this Court *sua sponte* dismissed the appeal. That is all that was decided or attempted to be decided there.”

Hume vs. Rogue River Packing Co., 92 Pac., p. 1069.

Moreover, the injunction granted in the Turner case was based entirely upon the aforesaid Oregon statute, which was five years later held to be unconstitutional and void, in the Rogue River case.

Appellant's other citations hold:

40 L. R. A. Note, p. 605: Summary of riparian owner's right of access. Sets forth, on page 602, the Oregon and Washington rulings that a riparian

owner has no peculiar rights in the water as an incident to his estate.

1 Farnham on Waters, p. 290, *et seq*:

“Whether an obstruction in the river amounts to an interference with the riparian owner’s right of access is a question of fact to be determined by the circumstances of each case (p. 295).”

In accord with the Eagle Cliff decision, *supra*.

Lewis on Eminent Domain, Sec. 641:

Treats the right of access as extending to the water.

San Francisco Svgs. Union vs. R. G. R. Pet. etc., (Cal.) 77 Pac. 823:

Enjoins as trespass a structure erected between high and low water mark, interfering with access to the water’s edge.

Yates vs. Milwaukee, 10 Wall. 497:

Right of access to wharf.

Angell on Water Courses, Sec. 67:

States that a riparian owner has exclusive right to draw seines upon his own land. The preceding section, 66, points out that anyone may take the fish in tide waters, unless the right has been granted to another by legislative enactment, “so that he does not trespass upon the land of others.” In the case at bar, it is not hinted that appellees touched appellant’s land; nor has appellees’ set-net right been granted to others by legislation.

Case vs. Toftus, 39 Fed. 730-734:

Concedes right of access to shore-owner "subject to the power of the legislature to regulate such use or privilege." The legislatures of Oregon and Washington have regulated any degree of access a shore-owner may have beyond the water's edge by the granting of franchises for set-nets and traps which may or may not tend to limit that access; which legislative power *Case vs. Toftus* expressly concedes.

Paine Lbr. Co. vs. U. S., 55 Fed. 854:

A riparian owner may build a wharf, "subject, however, to such restrictions as may, by law, be imposed (p. 866)." Nowhere in the record of the case at bar does it appear that appellees' set-nets would have interfered with a wharf had appellant built one, but the *contra* is shown.

Shepherd vs. Couer d'Alene Lbr. Co. (Idaho) 101 Pac. 591:

Plaintiff's ingress and egress were entirely obstructed by a log boom, which was enjoined. Appellant here has never contended that it was completely shut off from ingress and egress, as was Shepherd by the log boom, or as the Court held the Eagle Cliff Company to be by the long parallel cable.

Parker vs. Taylor, 7 Or. 448:

Shore owner may construct a wharf.

Shirley vs. Bishop, (Cal.) 8 Pac. 82:

A wharf three feet from shore and parallel to it for a distance of sixty feet was enjoined as an unreasonable interference with the upland owner's right of access to the water.

1 Farnham on Waters, sec. 66:

Not a word about the right to draw seines. This section simply discusses the right of access in general, as outlined in our argument, *supra*, and summarizes with this statement (p. 302):

“* * * The right is confined to access to the front of the property, and does not include a right of access to the sides of piers which may be projected into the stream”;

citing cases, one of which, *Vander Brooks vs. Currier*, 2 Mich. U. P. 21, held that a wharf owner cannot enjoin another wharf from being extended farther into the stream, although the effect is to make the access to his own wharf more difficult. Yet appellant's contention is that such plaintiff could have enjoined everything whatever, in order to maintain a clear space of water, had he wished to keep it so in order, for example, to tow a very broad boom of logs to his wharf. The principle is the same.

2 Farnham on Waters, sec. 872:

Not a word on the point contended for. Section 872 treats of the building of structures in a fresh water stream the title to the bed of which is in the riparian owner; holding that even then his right:

“* * * to prevent others from building there, may be modified, not only by contracts which he has entered into, but also by the policy of the state as represented by legislative grants.”

In other words, even if appellant owned the bed of the Columbia River its right to prevent appellees from building their structures would be subject to

the policy of the State, which has been to grant franchises for set-nets here and elsewhere.

Parker vs. Rogers, 8 Or. 183:

Right to construct a wharf granted by Oregon statute to shore-owner. Court holds this a franchise, not a property right, hence does not pass with title to tide lands across which wharf runs when said right has been reserved by shore-owner.

Wilson vs. Welch, 12 Or. 353 (7 Pac. 341):

Nothing about riparian rights. Sets aside a sale of tide lands to third party because statutory 60 days' notice had not been given shore-owner by the State.

De Force vs. Welch, 10 Or. 508:

Nothing about riparian rights. Held that defendant came within provisions of the act of 1874, giving upland owner prior right to purchase tide lands.

Shively vs. Parker, 9 Or. 505-6:

An issue of fraud. The reference on pp. 505-6 is mere dictum, stating that the Court presumes W "succeeded to whatever riparian rights were appurtenant to his interest in the claim."

Bowlby vs. Shively, 22 Or. 410 (30 Pac. 154):

Defendant, as upland owner, contended that he had riparian rights over tide lands sold by the State to plaintiff. Held that he had not; and that since defendant's predecessors had failed to build a wharf across tide lands prior to 1874 (when legislature vested a franchise in upland owners for their wharves then standing), wharfage rights, which are appurtenant to the tide lands themselves, did not

exist as a franchise for defendant. This case was afterwards before the Supreme Court of the United States, *Shively vs. Bowlby*, 152 U. S. 1, and an exhaustive opinion of that court which has made the case famous, affirmed the Oregon Supreme Court, and declared the law as we here state it.

Parker vs. West Coast Packing Co., 17 Or. 510 (21 Pac. 822) :

Upland owner in deed of tide lands reserved right to build wharves and sought to eject tide-land owner, for having himself built one. Held ejectment not to be the proper form of action.

In view of the foregoing authorities, as above analyzed, cited by appellant to uphold its remarkable contention, it would seem to be unnecessary to cite more on appellees' account. Without exception, they support our argument on riparian rights, and without exception fail to establish any right in a shore owner by virtue of his riparian ownership, to keep an entire water course free and clear of all obstructions, despite the policy of the water's owner, the State.

This is a most unusual situation, where appellant has itself cited all the law necessary to disprove its own contention and sustain that of appellees.

FURTHER AS TO SHORE-OWNER'S RELATION TO FISHING RIGHTS ESTABLISHED BY STATE.

We trust we may be excused for further discussion of the law. From the very nature of a public fishery, every one, primarily, has an equal right

in it; and yet to be available to any one, he must, for a time, have exclusive rights of occupation and user, and this is exactly what the legislatures of both states bordering on the Columbia River, have attempted to give their respective licensees. Both states recognize set-nets as proper and appropriate fixed fishing appliances for the catching of salmon, and both states exact license fees and issue annual licenses therefor, which licenses the Supreme Court of the State of Washington, in *Walker vs. Stone*, 17 Wash. 578, has denominated as "franchises," and declared that their violation is an injury and properly cognizable in equity.

See also:

Halleck vs. Davis, 22 Wash. 393.

Legoe vs. Chicago Fish. Co., 24 Wash. 175.

White Crest Can. Co. vs. Sims, 30 Wash. 374

The following Washington cases have held that no fishing right can be initiated by trespass against the prior locator:

Elwood vs. Dickinson, 26 Wash. 631.

White Crest Can. Co. vs. Sims, *supra*.

Womer vs. O'Brien, 37 Wash. 9.

In the following two cases, the distances between conflicting locations of fish traps on the Columbia River were adjusted in favor of the prior locator:

Giles vs. Baseel, 38 Wash. 212.

Johansen vs. Mulligan, 41 Wash. 379.

The title to the bed of all navigable rivers being in the State, the title to fish before they are cap-

tured is in the State, in its sovereign capacity, in trust for all its citizens.

Portland Fish Co. vs. Benson, 56 Or. 147 (108 Pac. 122).

The sovereignty having jurisdiction over navigable waters may, under its police power, regulate or restrict the right of fishing therein.

State vs. Nielsen, 51 Or. 588 (95 Pac. 720).

The State being invested with title to the fish they cannot lawfully be captured without the State's express or implied permission, and hence a statute making it unlawful to engage in the business of canning salmon without obtaining a license, is a valid exercise of legislative power.

State vs. Hume, 52 Or. 1 (95 Pac. 808).

It has already been shown that appellees were properly licensed by the State of Washington to fish with set-nets in the Columbia River, and that said licenses had actually been attached to the locations selected by them for a period of more than ten days prior to the issuance of the State licenses to appellant. One of the appellees, McGowan, also had licenses from Oregon. Inasmuch as he was and is a citizen of the State of Washington, we call attention to the Oregon statute authorizing the issuance of fishing licenses to residents and citizens of Washington, to-wit: Sec. 4092 of B. & C. Code (Ore.).

Each State has a comprehensive license system. Drag-seines, like set-nets, are licensed, and the stat-

utes prescribe the manner in which the licensees may locate their licenses on the ground, in other words, pre-empt their fishing sites.

2 Rem. & Bal. Code (Wash.), Sec. 5214.

B. & C. Code (Ore.), Sec. 4098.

Appellant recognized the authority of the State of Washington to issue fishing licenses for the premises in controversy, and took out its roving licenses on June 30th, 1908. Before that time, the grounds had been located by the appellees under their State licenses, and appellant's licenses could not be spread over the same territory. Appellant came as a trespasser, and, under the Washington authorities, *supra*, took nothing, not even the initiation of a claim that could ever ripen into a right.

Notwithstanding the foregoing established system in both states, specially authorizing fixed fishing appliances, appellant has, at all times, insisted and still insists that its riparian ownership, as such, gives it the right to enjoin the operation of a fixed fishing appliance in front of its shore lands, on the claim that such operation prevents it from approaching its own shore lands in the manner it wishes to do. Appellant may protest as much as it chooses, but such claim is necessarily based upon the theory that its shore land ownership gives it rights out, in and over the water that are superior to the licensed appliances for fishing established by authority of the State. Such a contention is, in plain contravention of the settled policy of both States, in the exercise of their sovereign powers concerning the regulation

of fisheries, and will not be entertained by the Federal Courts to the advantage of a shore-owner, and against the rights of the States' licensees. That a shore-owner's rights in and over the water must be exercised subject to the rights of others, as authorized by the sovereign State, which has control over the waters and the fisheries, we refer to the following:

Ferry etc. vs. White River Assn., (Fla.) 48 So. 643.

2 Farnham on Waters, Sec. 375.

Shively vs. Bowlby, *supra*.

Hardin vs. Jordan, 140 U. S. 371.

Mann vs. Tacoma Land Co., 153 U. S. 273.

Dunham vs. Lamphere, 3 Gray (Mass.) 268.

Manchester vs. Mass., 139 U. S. 262.

McCready vs. Virginia, 94 U. S. 391.

Smith vs. Maryland, 18 How. 71.

In the recent case of *Barron vs. Alexander*, 206 Fed. Rep. 272, decided by this Court July 7th, 1913, a shore-owner sought to enjoin the construction of a fish trap in the waters in front of his property. It was held that he had no such right, and the injunction was denied. This was in the waters of Chatham Strait, Alaska, and the principle involved, we believe, is in all respects the same as the one involved here.

The plaintiff in that case alleged that he was the president and largely interested in a certain named corporation owning and operating a large salmon cannery at Funter Bay, Alaska, about four miles from the site in question, and that it had at all times

been the intention of the plaintiff to use the upland tract referred to,

“* * * and the right of way out to deep water the entire width of said land as a fishing site and station, all of which is necessary to have and hold in order for plaintiff to successfully carry on the cannery business in which he is engaged.”

In short, the plaintiff sought to prevent the fixed fishing appliance in front of his upland because he wished to preserve the whole water frontage for approaching his shore in any manner he chose to do, as appellant seeks to do here. The Court emphatically said he had no such right. Such late expression of this Court should, we believe, be decisive here in favor of appellees.

To the same effect is *Columbia Canning Co. vs. Hampton*, 161 Fed. 60, also decided by this Court.

DAMAGES.

In the argument of appellant's counsel upon this subject he severely arraigns both the special Master and the Trial Court. He seems to be gifted with much skill in the use of hyperbole, such as would do justice to a melodramatic story, but the propriety of its use in a legal argument may be open to dispute. It may appeal to some as having the appearance of force and vigor, but it will hardly be said that it supports the character of elegance and dignity common to serious legal arguments. Some idea of these laconic contributions to the literature of this case

may be gathered from the following quotations from appellant's brief:

“not supported by a scintilla of competent evidence”;

“not a single witness testified,” etc;

“is no finding of any fact in issue”;

“absolutely no standard upon which any one could base an opinion”;

“no human being had ever caught any fish by any such process there”;

“the entire recklessness of this finding”;

“the total disregard of the lower Court of appellant's rights”;

“nothing could be more erroneous and absurd than findings No. IV. and V.”;

“is nothing more nor less than judicial robbery.”

The foregoing have the appearance of indicative catch words as flashed upon the screen of a picture show, and counsel apparently intended them as such here by way of illustrating his theory of the story he was writing for this Court. We are, however, unable to see how they may be complacently received by the sincere and painstaking trial court who tried this case, or by this Court in its regard for the proprieties and courtesies due to those upon the bench who labor so hard to reach just results.

RULE FOR MEASURING DAMAGES.

Appellant argues that appellees abandoned their original theory as to the measurement of damages

and also that the special Master and Judge Cushman overruled Judge Donworth as to the proper method for computing the damages. It will be remembered that by reason of appellant's injunction the appellees were deprived of the use of their fishing locations during four fishing seasons, that is to say during the years 1908, 1909, 1910 and 1911. After the action was commenced and the injunction issued, the four fishing seasons passed, before the judgment was entered by Judge Donworth which dissolved appellant's injunction. During all that time the appellant was occupying the ground and fishing with its drag-seines. Preliminary to the entry of the decree which dissolved the injunction, Judge Donworth filed an opinion, in which he stated that the cause would be referred to a special Master to take further testimony upon the subject of damages to appellees by reason of their having been deprived of the locations for the four fishing seasons; and in the opinion (Tr., p. 172) Judge Donworth said the following:

“I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set-nets and how much profit they would have made from them. Such a method is entirely too conjectural. Defendants are entitled, however, to the reasonable net rental value of the set-net location out of which they had been kept by reason of the restraining order. While the probable catch of fish by means of the set-nets

would be one of the circumstances affecting the net rental value, it would not, in itself, be the measure of damages.”

It will be seen that Judge Donworth declared the rental value of the locations to be the basis for determining the damages. While he said in his opinion that he would not consider an estimate of how many fish appellees would have caught in the set-nets, and the profit thereon, as a proper measure of damages, yet he did further say that the probable catch of fish by means of the set-nets would be “one of the circumstances affecting the rental value,” although that would not be sufficient in itself. At that time nothing had appeared in the evidence to show Judge Donworth what had long been the established method of fixing the rental value of fishing locations on the Columbia River, and he had in mind only certain rules with respect to measuring rental value of property generally. He was not then informed, as the testimony afterwards taken clearly showed, that but one method exists for measuring the rental value of fishing locations upon the Columbia River, which method is based alone upon the annual catch of fish at a given location.

Appellees introduced testimony to show the method of fixing the rental value of fishing locations upon the Columbia River, and appellant did not controvert this testimony by attempting to show any other or different rule. The testimony showed the rule to be that the rental value of a location to the lessor, for the fishing season, is equal to one-

third of the gross catch of fish at the location for the season, and that the lessee is entitled to two-thirds of the gross catch if he furnishes the fishing gear. If, however, the lessor furnishes both the location and the gear, he is entitled to one-half of the gross catch. The foregoing was shown to be the long-prevailing and only rule, by witnesses who have for many years been engaged in the fishing business on the Columbia River.

See testimony of

Amon Markham, Tr. pp. 469-471.

Ralph Grable, Tr. pp. 496-497.

H. S. McGowan, Tr. pp. 557-559.

Erick Lindstrom, Tr. p. 600.

The rule, we believe, must be regarded as an established fact, as it was not seriously controverted and no other was shown. Bearing this rule in mind, the appellees are in the position of forced lessors, since they were deprived of the use of their locations, and the measure of their damages is the rental value. As Judge Donworth indicated in his opinion, we are required to resort to the circumstance of an estimate of the number of fish that might have been caught in the set-nets for the years involved, and the evidence shows it to be a necessary circumstance to determine the rental value. There was therefore no real departure from the rule announced by Judge Donworth, and any seeming modification of it was such as he, himself, would have been impelled to follow, had he remained upon the bench and heard the

subsequent testimony before the trial was concluded upon the question of damages.

The testimony being as hereinbefore set out, without even any conflict, the rule is therefore established as fully as any fact in this case. The inherent peculiar nature of a fishing location is such as takes it out of any ordinary class of rentable property, and the reason for the usage as to fixing rental value of such locations is manifest. The existence of the rule being a fact, there was no other way to prove the rental value, which Judge Donworth had declared to be the proper measure of damages.

We wish to call attention to the following authorities which have to do with measuring damages in similar situations to the one at bar. While the damages were not in terms referred to as being equal to the rental value, as Judge Donworth seems to put it, yet the class of evidence considered and the conclusions from the methods of computation there used, lead to the same result, and, in the end, it amounts to the rental value, although referred to as probable profits of the business. This is true for the reason that, as we have seen under the testimony in this case, the rental value, under the custom of the Columbia River, is always measured by the results of the business of the fishing season.

The case of *Pacific Steam Whaling Co. vs. Alaska Packers Association* (Cal.), 72 Pac. pp. 161-165, is directly in point as to what damages should be recovered in a similar situation, where one has been

deprived of the use of a fishing location. We quote from the opinion, beginning on page 163, as follows:

“Upon the subject of actual damages there was no error in admitting evidence or instructing the jury. Plaintiff claimed that it had been forcibly excluded by defendant from salmon fishing in the said waters during the fishing season of 1897. The court had instructed the jury on that point as follows: ‘I instruct you that sufficient reason would exist for plaintiff to desist from further attempt to fish if the acts and declarations of defendant’s agent were such as would satisfy a reasonable man that further attempts to fish would be useless, because they would be met and frustrated by force’; and there was evidence to warrant the jury in finding the fact referred to in the instruction. The general nature of the evidence as to actual damages to which defendant objected, and which plaintiff was allowed to introduce, was this: Evidence tending to show how many fish plaintiff could, with reasonable probability, have taken from the fishing grounds in question if it had not been excluded therefrom by the unlawful acts of defendant, the value of such fish, and the profits which would reasonably have accrued to the plaintiff from the fish when canned. Plaintiff was also, in this connection, allowed to introduce evidence tending to show how many fish defendant actually did take in these fish-

eries during the said season. The court also instructed the jury as follows: 'I instruct you that if you find that defendant or its employes or servants were, under the law as given you, guilty of the acts constituting an unlawful interference with plaintiff's pursuit of a lawful business in a lawful way, then you must assess as damages the amount which will compensate plaintiff for all the detriment proximately caused thereby. I instruct you that if you find that plaintiff suffered damage by reason of the alleged wrongful acts of the defendant, or of its servants and employes, then, in assessing the amount of damages caused to plaintiff by the alleged wrongful acts, you may consider the loss, if any, to plaintiff of probable profits in its business.' The position of defendant is that the evidence pointed to damages too much in the nature of mere speculative profits to be admissible at all. We do not think that in these rulings of the court as to evidence, or in giving the said instructions, there was any error. The profits sought to be proved were not so remote, uncertain, prospective, or conjectural as to be entirely beyond the range of legitimate damages. Of course, evidence of such damages should be closely scrutinized by a jury, and claims merely fanciful and beyond reasonably proximate certainty should be by them excluded; but the jury in this case were suitably instructed and warned

on that subject, and it is to be presumed that they did their duty in the premises. With respect to this kind of damage, of course, there cannot be the absolute certainty possible in many plainer cases; but a wrongdoer cannot entirely escape the consequences of his unlawful acts merely on account of the difficulty of proving damages. He can do so only where there is no possibility of a reasonably proximate estimation of such damages, which is not the fact in the case at bar. The waters in question here constituted a special salmon fishery, where those fish were to be found in great abundance, and the proposition that damages evidently suffered by plaintiff from the wrongful act of the defendant by which plaintiff was excluded from exercising the clearly valuable right of fishing in those waters are entirely beyond legal proof, cannot be maintained. We think that on this point the case at bar is within the rule announced in *Shoemaker vs. Acker*, 116 Cal. 239, 48 Pac. 62, and cases there cited."

The above case is cited with approval in Sutherland on Damages, (3rd Ed.) volume 1, p. 223, where it is said:

"A person who has been forcibly prevented from fishing in public waters may show the quantity of fish he might have caught, the value of the same, and the probable profits he would have made. As an aid in determining

these questions, he may prove the quantity of fish caught in the waters from which he was excluded by the defendant."

The rule, as thus stated, is not a recent one. In the case of *Post vs. Munn* (New Jersey, 1818), 7 American Decisions, 570, the plaintiff sought to recover damages for injury to his fishing net by a vessel. The court said, in part (p. 574):

"As little solidity does there seem in the objection to the proof about the run of the shad, and the usual profits of the net. For what is the suit brought? Not alone for the mere tearing of the net; that is but a small portion of the damage sustained. The greatest part of the injury arises from losing the use of the net, and the value of that use depends upon the run of the shad. There is no other mode in which the plaintiff could show what really were the damages sustained by him."

There are many analagous cases, and although but few of them involve the question of fisheries, the principles are the same. In the case of *Allison vs. Chandler*, 11 Mich. 542, the plaintiff asked damages for injuries by which his house was made untenable. The court said (pp. 555-6):

"The evidence strongly tended to show an ouster of the plaintiff for the balance of the term, by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be com-

pelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he can not justly be limited to such sum—or the difference between the rent he was paying and the fair rental value of the premises—if the premises were of much greater and peculiar value to him, on account of the business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. * * *

The rule which would confine the plaintiff to

the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in the case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law."

In *Edwards vs. Edwards*, 31 Ill. 474, an injunction was issued early in the spring and was dissolved in September, and during that time, restrained the party from taking possession of a farm. It was insisted that the measure of damages should be the value of the use of the land up to the time when the injunction was dissolved. The court, however, allowed the evidence to take a wider range and show that being kept out of the land until the first of September occasioned the loss of the crops for the season. The question was not what the land was worth to the complainant in the injunction suit, but what was the damage to the defendant for being kept out of possession during that period.

In view of the above authorities, taken in connection with what is said in Judge Donworth's opinion in this case, and also in view of the evidence as to the method of fixing the rental value of Columbia River fishing locations, together with the evidence as to the annual output of fish at the Sand Island locations, we submit that the only

proper rule for measuring the damages was followed by the Court.

AS TO PROVING RENTAL RULE.

Counsel for appellant merely suggests that the rule must be pleaded before it can be proved. No such objection was made to the testimony at the trial and it should not now be considered on appeal. Moreover, this is an equity suit, first instituted by the appellant itself, and all the damage arose directly from appellant's act in bringing the action and invoking the strong arm of the Court to dispossess appellees from their locations. Equity having taken hold of this controversy will settle it for all purposes, including the damages.

16 Cyc. pp. 106 and 107 and cases there cited.

It was the duty of the Court to ascertain the true amount of the damages without reference to any technical rules of pleading. The testimony having been offered and received without any objection on the ground that it involved a rule or custom not pleaded, the Court should under all modern liberal rules as to amendments and especially in an equity cause deem the pleadings to be amended to conform to the proof, especially so when the point was not raised below in a manner to give opportunity for amendment.

“One class of amendments is freely permitted without much regard to the time when the application is made, * * *. Amendments are therefore permitted where the evi-

dence has made out a case for relief, but differing in some of its phases, sometimes materially, from the case made by the bill, and also where there is a similar variance between the bill and the findings of a master or committee; * * * . In most of the cases cited the amendment was asked and allowed on the hearing, but it may be made after the hearing, after verdict on issues submitted to the jury, or sometimes even on appeal.”

16 Cyc. 346 and 347 and cases there cited.

The testimony of the witnesses upon this subject was strictly in accordance with well-settled legal rules. The witnesses did not testify as to their opinion upon the subject, but as to the fact that such a usage existed.

12 Cyc. 1099, and cases there cited.

29 Am. & Eng. Enc. of Law 410 *et seq.*, and cases there cited.

EXTENT OF THE DAMAGES.

The rule for measuring the damages being established it was next the Court's duty to ascertain the extent thereof. Appellees being in the position of forced lessors were entitled to recover one-third of the value of the catch, which their set nets would have caught during the four seasons they were deprived of their locations. There was no way to ascertain the amount by an actual catch of the set nets during that time, as appellees were prohibited from operating them. The only way to ascertain it

was by comparison with the actual catch of appellant's drag seines at the same location, and during the same years.

The appellees introduced as witnesses experienced fishermen who have long fished upon the Columbia River, and who are familiar with the location in question. These men were experienced in the operation of the various fishing devices, including set nets.

It was frequently testified that the location in question is the best fishing ground on the Columbia River and no witness testified to the contrary effect. It will be remembered that during the four fishing seasons involved the appellant fished the location with drag seines and the exact amount of the catch made by the drag seines was stated by the testimony of R. A. Hawkins, appellant's superintendent, as hereinafter shown.

The witnesses above mentioned concurred in the opinion that the set nets which appellees would have operated on that ground, if they had not been prevented by appellant's injunction, would have caught two-thirds as many fish as were caught by the drag seines.

See testimony of

Amon Markham, Tr. p. 466.

Ralph Grable, Tr. p. 502.

H. S. McGowan, Tr. pp. 557-559.

R. A. Hawkins, appellant's superintendent, testified that the drag seines actually caught the following amounts for the several years:

1908	150 tons
1909	104 tons
1910	135 tons
1911	390 tons

Total for the four years....779 tons

See Tr. pp. 699 and 700, also p. 221 concerning the first three years.

The total catch of the drag seines having been 779 tons, two-thirds of that amount, or 518 tons, would have been the catch of appellees' set nets. Under the rule already stated as to rental value appellees were entitled to one-third of 518 tons, or 172 tons, as the rental value of their locations, the measure of their damages.

There was much testimony as to the price of fish, but H. S. McGowan testified, Tr. p. 565, that the average selling price for those years was \$130.00 per ton; 172 tons at \$130.00 per ton amounts to \$22,360.00, which was the amount of damages found by the Special Master. The Court on the hearing upon the Special Master's report reduced the amount to \$22,083.00 and judgment in the aggregate was entered for the latter amount in the final decree. Tr. pp. 199-202. The amount of the judgment is fully sustained by the evidence and represents the true amount appellees are entitled to recover. Appellant's counsel characterizes the judgment as "judicial robbery," but he should remember that appellees have rights which are protected by law as well as his own client, and it ill becomes him to so speak of the solemn judgment of a careful

Court who seriously endeavored to find the facts as they were shown by the testimony and to render judgment for the correct amount. Appellees' testimony tended to show that the drag seines should have caught a substantially greater amount than Mr. Hawkins' figures showed, but as his testimony was definite and positive as to the actual amount caught, the Special Master adopted his figures and the Court confirmed them.

H. S. McGowan testified, Tr. p. 567, that the three appellees are equally interested in the recoverable damages and the judgment was accordingly so entered, awarding to each appellee judgment for one-third of the total damages found, and for one-third of the taxable costs expended, limiting the total judgment against the Surety Company, the surety upon the injunction bond, to \$12,000. The amount of the liability upon the bond in favor of each appellee, \$4,000, was included as against the surety, The United States Fidelity and Guaranty Company. Tr. pp. 201-2.

AS TO APPELLANT'S SO-CALLED "FORCED INJUNCTION."

Appellant makes the unique argument that appellees are not entitled to recover damages for any period of time after appellant's motion to dismiss was filed. The argument is that if appellees had not resisted the motion, the action would have been dismissed and the injunction thereby dissolved. It will be remembered that the motion to dismiss was made upon the sole and only ground that the Court

had not jurisdiction. Meantime, appellees had interposed their cross-complaints for damages, which they had a perfect right to maintain without having to go into another forum, if the Court had jurisdiction over the parties. The trial Court as we have seen held that it had jurisdiction and proceeded with the action. If the appellant had desired to be relieved of future liability for its injunction, it was a simple matter to ask the Court to dissolve it, to which no objection could have been made, even if the action did proceed for the determination of damages for past time. Thereafter appellees could have resumed their locations and caught the very fish which were caught by appellant in the subsequent years, in which event they would have had no cause for damages in those years. Appellant, however, at all times, kept its injunction alive when it could easily have procured its dissolution, choosing to do so in order that it might by protection of the injunction occupy the fishing grounds and exclude appellees therefrom. Appellant says that it filed its motion early in June, 1909, which was about the beginning of the fishing season of that year. If it had then asked the Court to dissolve the injunction regardless of the question of jurisdiction, it might have been relieved from liability for the years 1909, 1910, and 1911. Appellant, however, used the strong power of the injunction to maintain its occupancy for those years, and as the record shows, it caught during those three seasons 629 tons of fish at those locations, of the value of

\$81,770.00. It is certainly a novel contention that under these circumstances it can now walk away with more than \$80,000.00 worth of appellees' fish, and say it is not liable for damages because it tried to dismiss its action. Dismissal of the action with the cross-complaints in existence was one thing, and dissolution of an injunction in the same case was quite another thing. Appellant sought to go out of the trial court on damages and everything else, but when it found it could not do that, it at all times insisted upon maintaining its injunction, and must now accept the consequences. This case has developed peculiar phases, but none more peculiar than appellant's argument on this point. The motion to dismiss was not even denied by the Court until September, 1909, and even under appellant's own remarkable theory, appellees had already lost the seasons of 1908 and 1909. We can see no reason for extending remarks upon this point, since the above analysis of appellant's argument shows that it must fall by its own weight.

CONCLUSION.

In conclusion, appellees urge that the following points are fully established in this case:

1.—That the trial court had complete jurisdiction over the parties to the suit by reason of diverse citizenship. The action in its nature being *in personam* was to obtain an injunction which could act only upon the persons. As shown by the complaint, the initiatory pleading, the amount involved is far

above the sum of \$3,000.00 necessary to give the court jurisdiction on the ground of diverse citizenship. The action does not involve or affect real estate, and is in no sense local, but is purely transitory, inasmuch as it affects the acts and conduct of persons only.

2.—That appellant has not, by virtue of its riparian ownership as lessee of Sand Island, any rights below low water line which may not be enjoyed by other citizens of the State; that as such shore-owner, it has the right of access to the water's edge and the exclusive right to draw seines upon its own shore; that while it may so exclusively draw seines upon its own shore, yet that gives it no right to operate its seines in the waters in front, except subject to the fishing regulations established by the State; and no right as such shore-owner to enjoin licensed fishing appliances in the waters below its lands.

3.—That under the fishing regulations established by the State, fixed fishing appliances, such as set-nets and traps, are fully authorized in the waters in question, and appellees' set-nets having been properly located, and constructed there, appellant, as shore-owner, cannot interfere with their operation in order to serve its drag seine purposes.

4.—That appellant's injunction was improperly sought and issued in this cause for the reason that it, without the basis of any legal right, stopped the operation of appellees' set-nets, resulting in great damage to them.

5.—That the amount of damages ascertained and assessed by the Court is amply sustained and justified by the record in every particular.

Believing that the above points are fully established by the law and the facts, we respectfully submit that the judgment of the lower court should be affirmed.

WELSH & WELSH and
DORR & HADLEY,
Solicitors for Appellees.

United States
Circuit Court of Appeals

For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION
(a corporation),

Appellant,

vs.

H. S. MCGOWAN, ERICK LINDSTROM and J. P.
COYLE,

Appellees.

BRIEF FOR APPELLANT.

Appeal from the United States District Court for
the Western District of Washington.
Southern Division.

Hon. GEORGE DONWORTH, Judge.
Hon. EDWARD E. CUSHMAN, Judge

G. C. FULTON, Astoria, Oregon, Solicitor for Appellant.

DORR & HADLEY, Seattle, Wash.

WELSH & WELSH, South Bend, Wash. } Solicitors for Appellees.

Filed

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F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION

(a corporation),

Appellant,

vs.

**H. S. McGOWAN, ERICK LINDSTROM and J. P.
COYLE,**

Appellees.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

The appellant, plaintiff in the court below, instituted this suit for the purpose of enjoining the appellees, defendants in the court below, from placing and maintaining any fixed structures or obstructions in the waters of the Columbia River in front of that portion of Sand Island, in the State of Oregon, known and designated as "Sites numbered 2 and 3" between the line of ordinary low water and the line of navigability of said river.

This suit was instituted prior to the decision of the Supreme Court of the United States in the case of State of Washington v. State of Oregon, decided November 16, 1908. 29 Sup. Ct. Rep., 47, 631.

As an historical fact, supported also by the evidence in this case, the State of Washington, at the institution of this suit, was and had been for many years prior thereto exercising exclusive jurisdiction over the fishing industry in and upon and around Sand Island in the Columbia River. This is the only island in that vicinity by that name. The officials of the State of Washington exacted from all persons operating fishing appliances in that vicinity and north of the channel of the river south thereof, licenses, and prohibited operating any fishing appliance on Sand Island, or between it and the channel of said river south thereof, unless such person or persons should have first obtained a fishing license from the State of Washington, claiming that the boundary line of the State of Washington was at the middle of the channel of said river lying immediately south of Sand Island.

Sand Island was reserved from sale for military purposes by virtue of a proclamation issued by President Lincoln, August 29, 1863, (plaintiff's Exhibit "A") and has since been owned in fee by the United States. On October 21, 1864, (special laws of Oregon, 1864) the State of Oregon, by a special act, granted to the United States all the tidelands surrounding and adjacent thereto and bordering thereon, and said United States still is, and ever since has been, the owner of such tidelands.

Prior to the year 1905, the entire south shore of Sand Island had been employed during each fishing season by various fishermen exclusively for the pur-

pose of hauling seines in front thereof, and landing same. It had never been used or employed for any other purpose. There seems to have been some mutual understanding between the fishermen, whereby they recognized locations which had been selected, and the front thereof cleared for seining purposes, the United States Government not seeing fit to interfere with the seining thereon.

As we have stated, however, the entire south shore had ever been used exclusively for seining purposes. No set nets had ever been attempted.

In the year 1905, the Secretary of War, pursuant to the act of July 28, 1892 (United States Compiled Statutes 1901, pages 25-29-30), caused said island to be surveyed and subdivided into tracts, which it called "sites," which sites were numbered numerically, beginning at the west as sites 1, 2, 3, 4, and 5, for identification purposes. (See map attached Plff. Exhibit E pg. 722). These sites were all on the south shore, monuments were erected on the land establishing the corners to each. The Secretary of War then (1905) advertised that bids would be received for the leasing of such sites on a date certain. The appellant and appellee H. S. McGowan were rival bidders. The appellee H. S. McGowan was the best bidder for sites 2 and 3 and accordingly received a lease therefore for three years, beginning in March, 1905. McGowan occupied these sites under such lease during the fishing seasons for the years 1905, 1906 and 1907, without molestation from any one, but he employed the same exclusive-

ly in seine fishing. He operated no set nets thereon.

At the beginning of the year 1908, the secretary of War again advertised for bids for these sites, and the appellee H. S. McGowan and appellant were again rival bidders, but this time the appellant was the best bidder for said sites 2 and 3 and received a lease from the United States therefor. (Plaintiff's Exhibit "E").

This lease describes the premises leased as sites 2 and 3, accordingly as shown on maps attached to the lease, together with all "easements and appurtenances thereto belonging." The United States owned, of course, not only the highlands but also the tidelands. The map attached shows that sites 2 and 3 included the frontage to Sand Island. This, taken with the fact that such premises were valuable only for seining purposes and had never been used for any other purpose is conclusive that it was the intention of the government to grant to the appellant all of the tidelands, easements and appurtenances thereto. Of course, the other sites were leased to and occupied and fished by successful bidders during this entire controversy.

Appellant having been the successful bidder, armed with this lease from the government, in the early part of June, 1908, made very extensive preparations to operate seines on said two sites and frontage thereto. It employed a large number of men, horses, seines, skiffs, paraphernalia and power boats with which to operate its seines at said points, and sent them down on the said grounds. Upon

their arrival, it was discovered that the appellees had placed in the waters immediately fronting upon said sites 2 and 3, between the line of ordinary low water and the line of navigability, and, in fact, from one to two feet of water at low tide, a large number of buoys. These buoys were large timbers attached to steel cables, which in turn were attached to large heavy rock buoys sunk into the bed of the river, rendering it impossible to navigate a seine and also impossible to haul seines from the waters onto the said shore, or to land same from the shore of said sites. These buoys had numbers painted on them, indicating that appellees had undertaken to locate the ground as a set net location under the laws of Washington.

In any event, it was impossible for appellant to operate its seines, and they entirely destroyed the free ingress to and egress from the shore of said sites. The appellant thereupon removed said obstructions with considerable expense, and was proceeding to operate its seines when the appellees replaced them. They were again removed, and appellees again replaced them. Thereupon this suit was instituted.

As we have stated, the suit was instituted before the Supreme Court of the United States handed down its decision in the suit brought by the State of Washington v. State of Oregon to establish the boundary line between Washington and Oregon in the vicinity of Sand Island.

All of the licenses having been issued by the

State of Washington, the officials refusing to recognize any licenses from Oregon, the plaintiff was practically forced to begin its suit in the then United States Circuit Court for Washington, and in its bill of complaint filed therein, it alleged that said Sand Island was within the territorial jurisdiction of the State of Washington. The suit was instituted in good faith, the appellant at that time believing Sand Island to be in the state of Washington.

Immediately, however, upon the decision of the Supreme Court of the United States, in the case of the State of Washington v. State of Oregon, being published, the appellant on June 4, 1909 by proper proceedings, citing the historical facts above mentioned, suggested to the court below the fact that Sand Island and the premises in controversy were not within the territorial boundaries, nor within the jurisdiction of such court, and asked the court to dismiss this suit without prejudice, so that the appellant could prosecute its action in the courts of Oregon. The lower court, however, held that although Sand Island was in Oregon, and although appellant had been honestly mistaken as to the territorial boundaries of Washington, yet held it had jurisdiction in the premises and refused to dismiss the action. After the lower court had announced its opinion in this regard, the appellant obtained a rule authorizing it to file a supplemental complaint. This supplemental complaint was accordingly filed September 10th, 1910. (page 149. T. R.) wherein it alleged the true facts, namely, that Sand Island was

not within the territorial boundaries of the State of Washington, but, on the contrary, was within the territorial boundaries and under the exclusive jurisdiction of the State of Oregon, and alleged facts hereinbefore suggested, namely, that at the time the suit was brought, the territory was claimed by Washington and it was believed that Sand Island was in Washington, and suggested that the lower court was without jurisdiction, and asked for a dismissal of the suit. This request was also denied.

The appellees H. S. McGowan, Erick Lindstrom and J. P. Coyle, answered separately: each filed a cross bill, in which it is alleged that the appellees had acquired from the Fish Commissioner of the State of Washington separate licenses to operate set nets in the Columbia River, H. S. McGowan 2 licenses, Erick Lindstrom 3, and Coyle 3, and that pursuant to such licenses, they had located the buoys and obstructions complained of in appellant's complaint as and for eight set net locations for the purpose of operating eight set nets for taking salmon fish in the Columbia River, and that under the laws of the State of Washington they had the right to make such set net locations in any water in the Columbia River, and each alleged that by reason of the injunction, such set nets were not operated, and if they had been operated, large profits would have been derived from the catch of fish taken thereby, and damages were claimed against the appellant upon that ground.

It will be observed that the appellant in its

complaint was operating its seines by virtue of a license issued to it by the Fish Commissioner of the State of Washington.

It is also a matter of very great importance that the entire defense interposed by the appellees and the entire cause of action of each of the appellees against the appellant is based entirely upon 8 set net locations located under the laws of the State of Washington, and by virtue of 8 licenses issued by the Fish Commissioner of the State of Washington, and not pursuant to the laws of Oregon, or by virtue of any license issued by the Oregon authorities.

There are a number of propositions involved in this case which necessarily must be conceded and as to which there can possibly be no controversy. These may be stated substantially as follows:

FIRST: That Sand Island described in the pleadings, which includes sites number 2 and 3, is, and at and during all the times involved herein was, owned in fee by the United States, it having been reserved from sale for military purposes by proclamation issued by President Lincoln August 29, 1863. (Plaintiff's Exhibit "A".)

SECOND: That such island is and was at the institution of this suit entirely beyond the territorial boundaries and jurisdiction of the State of Washington, and exclusively within the territorial boundaries and jurisdiction of the State of Oregon. *State of Washington v. State of Oregon*, 29 Sup. Ct. Rep. 47, 631.

THIRD: That on October 21, 1864, the State of Oregon by a special act granted to the United States all the tidelands surrounding, adjacent and contiguous to Sand Island, and the United States is and has been ever since the owner in fee of such tidelands.

FOURTH: That on May 1, 1908, the Secretary of War, pursuant to the provisions of the act of Congress of July 28, 1892 (United States Compiled Statutes 1901, pages 25-29-30,) duly leased to appellant, an Oregon corporation but duly licensed to transact business in Washington, that portion of Sand Island known and designated as "Sites numbered 2 and 3." That these sites include not only the highlands but the tidelands as well, the lease reading "together with all the rights, easements and appurtenances thereto belonging." (Plaintiff's Exhibit "E".)

FIFTH: It must also be conceded that the Secretary of War had the authority to execute such lease, and that the same is a valid lease and vested in appellant all of the property rights belonging to the United States in the premises leased, and that by this lease, the appellant was placed in possession of all the rights, privileges and easements belonging to the United States.

SIXTH: It must also be conceded (it being the contention of both parties) that the only value attached to these rights is the right to land seines thereon, which includes the landing of boats and

vessels, and it is also conceded that the appellant paid the United States as rental therefor the sum of \$5,750.00 per annum.

SEVENTH: It must also be conceded, at least it certainly cannot be successfully denied, that the appellant for the purposes of this case is the owner of said two sites, together with all easements, rights and appurtenances thereunto belonging.

EIGHTH: It also is conceded that neither of the appellees has, or claims to have, any right, title, interest or estate of, in or to any part or portion of either of said sites, or to any easement, right or appurtenant thereto, or to any littoral or riparian rights in the frontage thereof.

NINTH: It is also conceded that appellant intended to use and employ the said shores to its said sites during the fishing season of each year during the term of its said lease in landing seines and boats and water crafts, and hauling seines in the waters of said river by means of boats and vessels, and that it could not do so, if appellees were permitted to maintain the structures complained of, and that these structures were between the line of ordinary low water and the line of navigability of the Columbia River.

TENTH: It is also conceded that the appellees, without any license or authority from the United States or appellant, but against the protest of appellant, placed in the waters of said river in front of said sites and between the line of low water and

the line of navigability thereof certain fixed structures, permanent in their nature, and such as to prevent appellant from landing its seines on said shore, thereby depriving plaintiff from operating and landing its seines, boats and vessels, as well as from hauling its seines from the shores into the water.

In this connection, it is well to observe that appellees base their right to deprive appellant of all ingress to and egress from the shores to these sites, deprive it of all right to land its boats and vessel on such shore, deprive it of the right to place its seines in the waters from such shores and to haul from the waters onto such shores its seines and vessels, solely upon the ground that they have a license issued by the Fish Commissioner of the State of Washington to operate certain set nets, and, as a corollary to this proposition that a license issued by the Fish Commissioner of the State of Washington to operate a fixed appliance is a license to the holder to construct and maintain any fixed appliance in the waters of **Oregon** that he may see fit, which can be used for the purpose of catching fish, in front of any premises he may desire, or at any point he may desire, so long as it is below the line of low water, without regard to whether it entirely deprives a shore owner of ingress to and egress from his shore. In other words, that the owner of tidelands in Oregon has no right of ingress to or egress from his premises to the line of navigability, which the owner of a fishing license issued by the Fish Commissioner of the State of Washington is bound to respect. Indeed,

such was the extraordinary doctrine announced by the court below. It was further held that under the laws of the State of Oregon, the owner of tidelands on the Columbia River has not the free and uninterrupted right of ingress to and egress from his premises to the navigable waters of the river. This doctrine is absolutely at variance with the decisions and holdings of the courts of Oregon, and is without support in any jurisdiction.

An attempt has been made by appellees to thrust into this case the proposition that appellant is attempting by this suit to establish in it an exclusive right of fishery in front of these sites in question. This is not the case—no such issue is presented. This proposition is not in this case directly or indirectly. Appellant is not seeking to prevent appellees from fishing in the waters of the Columbia River opposite these sites, and no injunction is asked enjoining them from fishing there. The sole object of this suit is to enjoin appellees from erecting or maintaining any fixed structure or fixed appliance in front of said premises which will prevent appellant from ingress to and egress from its premises. That is all there is to this case. The appellant has no objection whatever to the appellees fishing in front of said premises, but it does object to them building or maintaining fixed structures in front thereof, or placing obstructions in the bed of the river which will interfere with it in its right to draw seines from the water onto its own land. The appellees themselves are the ones that

claim this exclusive right of fishery. The appellees claim that they can occupy the entire water frontage of a tideland owner in Oregon with structures for the purpose of taking fish that cannot be interfered with by anybody. And, by some species of legerdermain, the appellees succeeded in instilling into the mind of the learned court below the thought that appellant, the owner of the shore, who only sought to protect its right of ingress to and egress from its premises, was seeking to establish a private fishery. In this the learned court was in very serious and profound error.

It is also well to note that although in the answer to appellant's supplemental complaint, appellee McGowan claims to have had Oregon fishing licenses, it is not contended either by the pleadings, or by any evidence in the case, that locations were made, or operations conducted, under any Oregon license, or that the laws of Oregon were in any respect complied with.

After the cause was at issue, it was referred to a special master to take testimony, which testimony was accordingly taken and the cause was submitted upon such testimony, resulting in an interlocutory decree being entered on May 5, 1912, the court below not agreeing with the attorneys for appellees as to the rule for the measure of appellees' damages. The interlocutory decree entered at that time decreed that the appellees were entitled to operate these set net locations under Washington licenses, and that their right was superior to the right of the

appellant, and the appellant was enjoined from interfering with such set nets or set net locations up to the 21st day of March, 1912. This interlocutory decree is found at page 173, Transcript of Record, and the opinion of the court in that regard is found at page 166 thereof. After the entry of this interlocutory decree, the cause was referred to a special master, with instructions to take additional testimony and report his Findings of Facts and Conclusions of law. The report of the special master is found on page 179, Transcript of Record. The appellant seasonably interposed its exceptions to such findings. The exceptions are printed beginning with page 184 of the Transcript of Record. The exceptions were, however, overruled and a final decree entered, awarding to the appellees a judgment against the appellant in the sum of \$22,083.00 and the costs of the action taxed at \$948.30. From this judgment the plaintiff in the court below prosecutes this appeal.

DECISION OF JUDGE DONWORTH.

After the testimony and evidence had been taken and the case closed, the cause was submitted to His Honor Judge Donworth, who handed down his decision in writing, which we respectfully call this court's attention to. (Pg. 166, Transcript of Record).

At the hearing, before such decision, it was contended by the learned counsel for the appellees that the measure of their damage was the number and value of fish that could be caught by the operation

of the set nets complained of, and the case of *Pacific Steam Whaling Co. v. Alaska Packers Association*, 72 Pac. 161-5, was cited and discussed, and it was also contended that the number of fish that were caught by appellant and the value thereof in its seines operated on said island was competent evidence as to the amount of such damage. The appellees had at that time offered no testimony as to the fair rental value of their locations for set net purposes. Therefore, Judge Donworth in passing, employed the following language:

“There will be a reference to a master to ascertain the damages recoverable by defendants under the **bond** given on the restraining order. The measure of damages is one of the subjects discussed by the parties in their briefs. I do not consider that it would be a proper measure of damages to try to estimate how many fish defendants would have caught in the set nets and how much profit they would have made from them. Such a method is entirely too conjectural. The defendants are entitled, however, to the reasonable net rental value of the set net location, out of which they have been kept by reason of the restraining order. While the probable catch of fish by means of the set nets would be one of the circumstances affecting the net rental value, it would not in itself be the measure of damages.”

In the face of this decision, the special master not only estimated the number of fish that would probably have been caught in a number of mythical

set nets which had never been operated, but took the quantity of fish that the appellant caught in its several seines which were operated over a territory many thousand times greater than the territory occupied by all of the appellees' set nets, and took the value of such fish as the damages sustained by the appellees. Judge Donworth having in the meantime resigned, Honorable Edward E. Cushman succeeded him, and upon exceptions to the master's report sustained all of them, leaving the case in a somewhat embarrassing situation to say the least with respect to the law of the case. This incongruous condition arose out of the fact that the State of Washington has never forgiven the people of the State of Oregon for the decision rendered by the Supreme Court of the United States, in the case of *State of Washington v. State of Oregon*, wherein the people of the State of Washington lost Sand Island. The appellant in this case had nothing whatever to do with that decision, and ought not be punished by reason thereof.

As we understand the issues and evidence, the legal propositions involved therein may be stated as follows:

FIRST: Had the lower court jurisdiction over the cause of action, it being conceded that the cause of action arose out of rights in real estate situated wholly without the State of Oregon?

SECOND: Did the licenses issued by the Fish Commissioner of the State of Washington to the appellees have any extra territorial force, or rather

were they not limited and confined within the territorial boundaries of Washington, and can any right to operate a fixed appliance in the Columbia River, wholly within Oregon, be based exclusively upon a license therefor issued by the Fish Commissioner of Washington, and locations made thereunder?

THIRD: Under the laws of the State of Oregon and decision of her court of last resort, does not a riparian proprietor own, as an incident thereto, the exclusive right of ingress to and egress from the line of navigability, limited, of course, to the general right of navigation and commerce?

FOURTH: Conceding that licenses issued by the Fish Commissioner of the State of Washington to construct and maintain a fixed structure do have extra territorial force and are enforceable and valid in Oregon, do the laws of Oregon as construed by its court of last resort permit the owner of such license, or any fishing license issued by any authority, to erect and maintain such fixed structure in front of an Oregon riparian proprietor, between the line of low water and the line of navigability, against the protest and consent of the owner of the shore and tide lands, whereby he will be deprived of free access to his shore?

FIFTH: It being conceded that Sand Island was wholly without the territorial boundaries of Oregon, can the appellees recover any damages whatever under their pleadings, taking into consideration that appellees in their cross-bills each plants

his entire cause of action upon rights alleged to have been acquired under licenses to operate set nets, issued by the Fish Commissioner of Washington, and locations made in compliance with the laws of Washington, but in violation of the laws of Oregon?

SIXTH: If appellees are entitled to damages, what is the rule for their measure of damage—the value of fish caught by appellant in its seines, or the value of fish that appellees imagine they might have caught, or the fair rental value of the premises for set net purposes?

Walter Bussey and I. N. Stensland were originally parties defendant. It subsequently appeared that each was only employees of the Appellee McGowan, and had no interest in the controversy, hence by agreement between the parties, the action was dismissed as to them, without cost to either party.

POINTS AND AUTHORITIES.

I.

This court is without jurisdiction over the cause of suit set forth in the bill of complaint, and is without jurisdiction over the cause of suit set forth in the cross-bills filed herein by the appellees.

Neither the cause of suit set forth in the bill of complaint, nor the causes of suit set forth in the cross bills filed by the appellees, arose on the Columbia River, within the meaning of the acts admitting the states of Oregon and Washington into the Union,

or the enabling acts of either, or the constitution of either of such states.

Act of Congress, May 2, 1853, 10 Sta. at Large, 172, Chap. 90.

Act of Congress, Feb. 14, 1859, 11 Sta. at Large, 383, Chap. 33.

M. & M. R. R. Co. v Ward, 67 U. S. 485.

Wood v. Marietta Chair Co., 158 U. S. 105.

North Ind. R. R. Co. v. Mich. Cent. R. R. Co., 15 How. 233.

Atlantic Dredging Co. v. Berger Neck Co., 44 Fed. 208.

Evansville Traction Co. v. Hudson Bridge Co., 134 Fed. 973-4.

12 A. & E. Ency. Pldgs. & Prac. 135.

Nielson v. Oregon, 29. Sup. Ct. 383.

Gilbert v. Moline Water Power Co., 19 Iowa 319.

Roberts v. Fullerton, 117 Wis. 222.

Indeed, the jurisdiction of the court, in this regard, had been adjudicated by that court.

In re. Mattson, 69 Fed. 535.

Ex Parte Desjiero, 152 Fed. 1004.

II.

The title and rights of riparian or littoral proprietors below high water mark, as well as the rights of riparian proprietors in all respects, are entirely governed by the laws of the state where located,

subject only to the paramount control of Congress over commerce and navigation.

Bowlby v. Shively, 152 U. S. 1; 14 Sup. Ct. Rep. 548.

Illinois v. Illinois Cent. Ry. Co., 184 U. S. 77.

Encyclopedia U. S. Sup. Ct., Vol. 8, pgs. 840-1.

1. Kinney on Irrigation and Water Rights, Sec. 453, et seq.

III.

Sand Island is and ever was within the boundaries of Oregon.

State of Washington v. Oregon, 29 Sup. Ct. Rep. 47-631.

IV.

Sand Island was, and ever has been, owned in fee by the United States.

Proclamation Abraham Lincoln, Plff's. Ex. "A".

Grisar v. McDowell, 73 U. S. 363 (Book 18, 863, L. ed.)

U. S. v. Payne, 8 Fed. 883.

Armstrong v. U. S., 13 Wall. 154 (Book 20 L. ed. 614).

United States also owned all the tide and shore land.

V.

The right of access to all points on the shore of a navigable water is an appurtenant to the land, and a riparian proprietor cannot be deprived of such

right without due process of law, and any interference therewith will be enjoined at the suit of the riparian proprietor.

Eagle Cliff Fishing Co. v. McGowan, et al.
(Or.) 137 Pac. 766.

40 L. R. A., note page 605.

Gould on Waters, Sec. 149.

1 Farnham on Waters, pg. 290 et seq.

Lewis on Eminent Domain, Sec. 641.

San Francisco Savings Union v. R. G. R. Pet.
etc. Co., 144 Cal. 134; 77 Pac. 823; 66 L.
R. A. 242.

Yates v. Milwaukee, 10 Wall. 479 (19 L. ed.
984).

Angell on Water Courses, Sec. 67.

Broward v. Mabry, 50 So. 826 et seq.

Oliver v. Klamath etc. Co., 54 Or. 95.

Case v. Toftus, 39 Fed. 730-734.

Paine Lumber Co. v. U. S., 55 Fed. 855.

Carli v. Stillwater, 28 Minn. 373; 10 N. W.
205.

Hobart-Lee Tie Co. v. Stone, 135 Mo. App.
438; 117 S. W. 604.

Shephard v. Couer-d-Alene Lumber Co.
(Idaho) 101 Pac. 591.

Parker v. Taylor, 7 Or. 448.

Shirley v. Bishop, 67 Cal. 543; 8 Pac. 82.

Angell on Water Courses, Sec. 67 (7th ed.).

1. Kinney on Irrigation and Water Rights,
Sec. 453. 551, et seq.

1. Wiel, Water Rights in Western States.
Sec. 5904.

Hume v. Turner, 42 Or. 202.

Hume v. Rogue River Pkg. Co., 51 Or. 240.

McCarty v. Murphy, 119 Wis. 159; 96 N. W.
531.

VI.

The right to draw seines upon and land same upon the tidelands on navigable waters is vested exclusively in the riparian owner and such right will be protected by injunction.

Eagle Cliff Fishing Co. v. McGowan, *supra*.

Angell on Water Courses (7th ed.) Sec. 67.

Commonwealth v. Shaw, 14 Serg & R. 9.

Gray v. Cann, 5 Day 72 (Conn.).

1 Farnham on Waters, Sec. 66.

2 Farnham on Waters, Sec. 872.

VII.

In Oregon, riparian rights attach to tide lands.

Eagle Cliff Fishing Co. v. McGowan, *supra*.

Parker v. Rogers, 8 Or. 183.

Wilson v. Welch, 12 Or. 353.

DeForce v. Welch, 10 Or. 508.

Shively v. Parker, 9 Or. 505-6.

Bowlby v. Shively, 22 Or. 410.

Also, in Oregon, a riparian proprietor may apply his frontage to any use not inconsistent with the right of the public.

Parker v. West Coast Pkg. Co., 17 Or. 510.

VIII.

Section 5294, Lord's Oregon Laws, reads as follows:

"It shall be unlawful for any person or persons to operate or maintain, or leave in condition to take fish, in any of the waters of this state at any time hereafter any fish trap, weir, pound net, set net, gill net, fish wheel, seine, or any device or apparatus or gear used in catching salmon fish or sturgeon without first obtaining from the Fish Warden a license therefore as hereinafter provided. (Act 1901, page 338, Session Laws of Oregon.)"

Under this law, the appellees had no set net locations. On the contrary, they were violating the laws of Oregon in attempting to operate set nets on the locations claimed by them.

IX.

CUSTOM.

Custom or usage cannot be proven simply by the personal opinion of witnesses. Both custom and usage must be proven by the evidence of facts, not of mere speculative opinions, and by witnesses who have had frequent and actual experience of the custom and usage, and do not speak from report alone.

Greenleaf on Evidence (13th ed.) Sec. 252.

2 Ency. of Ev., pg. 958 and cases cited.

Jones on Evidence, Sec. 463.

Armstrong v. Lake etc. Co., 147 N. Y. 495; 42 N. E. 186.

Horan v. Strachn, et al., 86 Ga. 408; 12 S. E. 681.

Williams v. Ninewire, 23 Wash. 593; 63 Pac. 534.

X.

CUSTOM ATTEMPTED TO BE ESTABLISHED BY THE EVIDENCE IN THIS CASE WAS A LOCAL CUSTOM.

This must have been pleaded.

22 Ency. of Pldg. & Pr., page 406 and cases cited.

XI.

MEASURE OF DAMAGES.

In any event, the measure of appellees' damages, if recoverable at all, is the value of the use of the set net locations. Profits they might possibly make in the operation are too remote.

Columbia & P. S. Co. v. Histogenetic Med. Co.,
14 Wash. 475; 45 Pac. 29.

Wythe, v. Meyers, 3 Sawyer 595.

4 Southerland on Damages (3rd ed.) Secs. 994,
1011

Beach v. Morgan, 67 N. H. 529; 41 At. 349.

Mitchell v. Wood, 17 Kans. 26.

ARGUMENT.

WE RESPECTFULLY SUBMIT THAT THE
LOWER COURT WAS WITHOUT JURISDIC-
TION OF EITHER THE CAUSE OF SUIT AL-

LEGED IN THE BILL OF COMPLAINT OR
EITHER OF THE CAUSES OF SUIT ALLEGED
IN THE CROSS BILLS FILED BY THE DE-
FENDANTS.

As we have stated, after the decision in the case of *State of Washington v. State of Oregon*, 29 Sup. Ct. Rep. 47, 631, and before any evidence was taken, or costs incurred, the appellant, by motion, suggested to the court below that it was without jurisdiction of either the cause of suit alleged in the bill of complaint or in the cross bills filed by appellees.

This motion was duly presented and submitted before any evidence was taken or costs incurred, and by the court overruled. Appellant then obtained a rule permitting it to file a supplementary complaint, which it filed, alleging that the premises in controversy were entirely without the jurisdiction of the lower court and entirely within the territorial boundaries and jurisdiction of the State of Oregon. That at the time the suit was instituted appellant was informed and believed that such premises were within the boundaries of the State of Washington. That the State of Washington had at all times exercised exclusively jurisdiction over such premises, and fishing appliances employed thereon, but that by decree of the Supreme Court of the United States, in the case above mentioned, the premises were held to be within the boundaries of the State of Oregon.

The appellees filed an answer to this supplementary complaint, denying the allegations thereof,

and contending that the premises were in the State of Washington.

There is, however, no question but the premises lie wholly without the boundaries of Washington and entirely within the State of Oregon. Therefore, we respectfully submit that the lower court had no jurisdiction to enter any decree herein other than to dismiss this suit.

This is a question which this court must now determine, for we urge the proposition against any judgment against appellant herein. We believe the most cursory examination of this question will convince the court of the correctness of our contention.

It has always been a serious question in the minds of the lawyers of the State of Oregon and the judiciary as well as to whether Washington has concurrent jurisdiction "in civil and criminal cases upon the Columbia and Snake Rivers." The act of Congress admitting her into the Union does not so provide. The Act of May 2, 1853, dividing the territory of Oregon and creating out of a portion of it, the territory of Washington, contains the following provision:—

"The territory of Oregon and the territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms a common boundary between said territories."

Nothing said there about the Snake or any river other than the Columbia, **and nothing about civil cases.**

The next act touching on the subject is that of Feb. 14, 1859, admitting Oregon into the Union. Section one of that Act, after describing the boundaries of the state, contains the following provision:—

“Including jurisdiction in civil and criminal cases, upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common with this State.”

Section two of same Act contains the following provision:—

“The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same.”

It will be observed that the provision quoted from the act defining or establishing the concurrent jurisdiction of the territories of Oregon and Washington **applies in criminal cases only**. The Act of Feb. 14, 1859, after defining the north boundary line of Oregon, provides, “including jurisdiction in civil and criminal cases upon the Columbia and Snake Rivers concurrently with states and territories of which those rivers form a boundary in common with these states;” but this contains no provision for concurrent jurisdiction with new states, as does the provision in section two of the same act above quoted. Since then Washington has been admitted into the Union, but the act admitting her makes no

provision for the exercise by her of even the concurrent jurisdiction with which, as a territory, she was vested. But even if it shall be held that admitting her into the Union with area she occupied as a territory, carries with it the concurrent jurisdiction with which she, as a territory was vested, it would only apply to "offenses committed on the Columbia River," and not to civil cases. It is true that the act admitting Oregon vested in her with "jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common" with her, and it may be well contended that such provision operate to vest concurrent jurisdiction in such states and territories, but it is to be observed that it is to Oregon and to her only that the "concurrent jurisdiction" is given. Her boundaries are described, and then, in addition to jurisdiction over that territory which would follow as a matter of course, it is provided, "**including** jurisdiction in civil and criminal cases" etc.; which was adding to her jurisdiction that which she otherwise would not have had. Washington was then a territory; Congress had power to extend or restrict her jurisdiction at will. It therefore said to Oregon, "we not only vest you with jurisdiction within your boundaries but also beyond your boundary line on the Columbia; there you shall exercise jurisdiction concurrently with Washington."

The provision in section one relative to "civil and criminal cases" did not vest in Oregon the pow-

er to regulate by legislation, matters arising on the river, hence the additional provision in said section two, granting to the State "concurrent jurisdiction **on** the Columbia" etc. etc. Not "in civil and criminal cases" only, but "jurisdiction" generally, which probably included legislative power or jurisdiction "upon" the river. The language, however, is always "on" or "upon the river." These expressions are equivalent to "on the water." Indeed, in section 2, Act of 1859, the concurrent jurisdiction vested in Oregon is, as we have seen, "**on** the Columbia and all other rivers and **Waters** bordering on the said state of Oregon," etc.

SIMILAR PROVISIONS IN ACTS ADMITTING OTHER STATES.

As stated by the Supreme Court in *Nielsen vs. Oregon*, 29 Sup. Ct. Rep. 383, quoting "concurrent jurisdiction properly so called, on rivers, is familiar to our legislation." All the states bordering on the Missouri, Mississippi and other great rivers and waters, have similar provisions in their enabling acts. Numerous cases have involved the construction of such provisions, but in no case has it been held or even seriously considered, so far as we can discover, that such jurisdiction empowers the courts of one state to regulate or determine property rights in the bed or shores of rivers or waters within the boundaries of the opposite state. For instance, the provision in the Iowa enabling act is as follows:—
"That the State of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other

river bordering on the said State of Iowa, so far as the said river, shall form a common boundary to said state and any other state or states" etc. 5 U. S. Statutes at Large, 742.

In *Gilbert vs. The Moline Water Power and Mfg. Co.*, 19 Iowa 319, the Supreme Court of that State held that an Iowa Court is without jurisdiction to abate a nuisance on the Illinois side of the river.

The defendant had "erected a dam across the south or slough channel of the Mississippi River" which was situated on the Illinois side of the river but opposite the premises of plaintiff in Iowa. In passing on the question, the court said:—

"Appellant bases the claim of jurisdiction upon the language of the acts admitting Illinois and Iowa into the Union, and the provisions of the Constitution and statutes of each in defining their respective boundaries. The act of 1818 (Ap. 18), admitting Illinois, gives to said state concurrent jurisdiction on the Mississippi river with any state or states to be formed west thereof, so far as the same shall form a common boundary. The act admitting Iowa contains the same provision as to concurrence of jurisdiction, Stat. at Large, 5,742. The statutes of Illinois recognize the same extent of jurisdiction; and in this state it is declared that our jurisdiction is concurrent on the waters of any river or lake which forms a common boundary between this and any other state. By our Constitution, our eastern bound-

ary is "the middle of the main channel of the Mississippi river." Preamble Rev. 986.

Now, while it is, of course, not claimed that the laws of this State would have inherent authority beyond the jurisdiction of the State, or that our laws can bind or affect property out of or beyond our territorial limits, it is insisted that this property, or that this alleged nuisance, is so situated that either State may direct the manner of its use, and order its removal or abatement if found to be of the character charged. That the Courts of Illinois might do this, there is, of course, no doubt. But the claim is, that our courts have the same concurrent right, on the complaint of one of our citizens, whose property, situated within our jurisdiction, is injured by the alleged unlawful obstruction. We do not believe, however, that the acts and constitutional provisions referred to include cases like that now before us.

There is an immense commerce on this great common highway. Water crafts, rafts, and boats of almost every kind and description, are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made, and obligations assumed, for which these boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property, by persons while **on the river**, or which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases were made to depend on the injury whether the boat or vessel was on one side or the other of the main channel,

whether the injury was inflicted or crime committed east or west, or north or south, of such line, it can be readily seen that it would frequently be almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or prosecution, and hence the reason of making the jurisdiction concurrent in all such cases. Such property, and persons are, as a rule, transitory, moving—here today and gone tomorrow. Here is a common highway open to the citizens of all States and all nations. It is declared common territory, and, as to matter arising thereon, or persons found thereon, sovereignties on either side have common or concurrent jurisdiction. Not so, however, as to an obstruction where the property therein, and the use thereof, is wholly on one side of the channel. It is as though an unhealthy, dangerous or illegal manufactory should be erected and continued on the Illinois shore, to the injury and annoyance of citizens on the Iowa side; and though such an erection should extend below low water mark, there would be not jurisdiction to declare its abatement in our Courts. Such injuries are not **on** the river with the purview of the acts referred to and relied upon by counsel. And this conclusion is the more warrantable, when we consider that in this case the main dam extends from the shore to the island (Rock Island) that this island containing hundreds of acres of land, is indisputably a part of the territory of our Sister state, and that to reach this obstruction or nuisance, our Courts and the officers

thereof must go beyond this island and decree and procure the removal of a work attached to the main shore, and placed there, too, as we are bound to suppose, with the consent of the state to which the corporation owes its life.”

It will be seen that the Court italicises the words “on” and “on the river.” Continuing, the Court refers to the case of the M. & M. Railroad Co. vs. Ward, 67 U. S. 485, to which we also invite the attention of the court in this case. The plaintiff in that case sought to abate a bridge across the Mississippi river by a suit prosecuted in the U. S. Circuit Court for the District of Iowa. The Supreme Court of the United States held that the Iowa Court was without jurisdiction to abate that portion of the bridge on the Illinois side of the boundary line. It is sufficient to quote from the decision of the 19 Iowa case above referred to, without quoting from the U. S. Supreme Court decision, in the bridge case. After stating that which we have quoted above, the Iowa Court continued as follows:—

“All room for doubt upon the subject, however, is, it seems to us, removed by the case of the M. & M. Railroad Co. vs. Ward, 2 Black 485. The object of the bill, in that case, was to abate the Rock Island bridge across the Mississippi river, and situated a few miles below the construction complained of in this case. The bridge extends entirely across the river and has its abutments on either shore. And yet it was there held that the nuisance complained of, being a bridge across the Mississippi river, where

that river divides the States of Illinois and Iowa, and the State line being in the middle of the river, the District Court for Iowa has no power to abate the nuisance on the Illinois side, and that if the obstruction was created by piers erected on the Illinois side, that was an offense against the laws of Illinois, and neither a state court of Iowa or the Federal Court for the district, can inquire into the facts or furnish a remedy. Surely no case could be more decisive of the question involved in another, than this one is of that now before us. If this rule is correct when applied to a bridge, a large portion of which is indisputably within the limits of our state, there can be no room for controversy, when applied to a nuisance, every part of which is beyond the middle line which divides the states. And, indeed, that case carries the rule so far, that it might be overruled without substantially affecting the merits of the present controversy."

The doctrine announced by the U. S. Supreme Court in *M. & M. Railroad Co. vs. Ward*, has been cited and approved many times but never departed from and is unquestionably the law.

A more recent case and one clearly in point is that of *Roberts vs. Fullerton*, 117 Wisconsin 222. In that case, the defendant, an officer of the State of Minnesota, had seized and destroyed plaintiff's fish net, located by him to catch fish and staked to the bottom of Lake Pepin, on the Wisconsin side of the boundary line, said lake being a boundary water.

Plaintiff's action was for damages for such seizure and destruction.

Defendant justified under the laws of the State of Minnesota, which he alleged in his answer, authorized his action. A demurrer to the answer was sustained by the trial court and the case was appealed by defendant. The act of Congress was similar to that in the Oregon enabling act, being as follows:—

“The said State of Wisconsin shall have concurrent jurisdiction on the Mississippi and all rivers and waters bordering on the said state of Wisconsin, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same.”

The Wisconsin Supreme Court affirmed the ruling of the lower court and in passing on the question at pages 224-225 said:—

“The term, ‘concurrent jurisdiction’ does not imply, as the learned attorney general for the State of Minnesota seems to suppose, that the people of the two states in their sovereign capacities are joint owners of the bed of the Mississippi river within the scope of the enabling acts referred to, or of the waters of the river or the fish therein or things thereon, under the principle laid down in *Rossmiller vs. State* 114 Wis. 169, 89 N. W. 839. . Ownership in that sense does not follow jurisdiction as the term was used in the enactments under discussion. It was competent for the national legislature, in the formation of the states, to extend the laws of each for certain purpose over territory of the other.

That was done, the jurisdiction **on** boundary waters being extended as to each state from shore to shore, while the boundary line between them was placed at the main channel of the river. That necessarily forms the boundary between them as to sovereign rights of ownership. Sovereign rights as regards ownership, of the bed of the Mississippi or anything permanently affixed thereto coincides with the territorial boundaries. Therein, as to everything of a tangible character forming part of the land, whether above the water or below the water, the jurisdiction of each state is exclusive.”

And at page 228, the Court said:—

“The meaning of the language of the federal law giving concurrent jurisdiction on the waters of a boundary river is to be restrained to the purposes thereof. For all other purposes the jurisdiction of each state on its side of the main channel of the river is exclusive. For examples; one State can neither authorize nor abate a permanent object in the river within the territory of the other; it cannot tax property either in the river or on the river on the opposite side of the main channel thereof.”

At page 230, the Court said:—

“However, we cannot come to the conclusion that ‘concurrent jurisdiction’ was used by Congress in the broad sense of the whole sovereign authority. That would be inconsistent with the decision of the federal court in *Mississippi & M. R. Co. vs. Ward*, 2 Black 485, as we have seen. It held, in a situation similar to the one involved here as regard the con-

current power of two states, that a permanent object in the river on one side of the main channel thereof, being wholly within the territorial limits of the state on that side, is subject to judicial control solely by the Courts of and for such state. Following that, as we have seen, courts have universally held that the words 'concurrent jurisdiction on' the river have reference to violation of law on the waters of the river actually or constructively. In *Buck vs. Ellenbolt*, 84 Iowa 394, —51 N. W. 22, it was held that the effect of *Mississippi & M. R. Co. vs. Ward* was to restrict the words 'concurrent jurisdiction' to actions in some way connected with the navigation of the river,—things on the river."

At page 235, the Court said:—

"Tested by the principle above adopted, do the mere police regulations of one country regarding the exercise of the common right of fishing extend into the territory of a foreign jurisdiction, the two being separated by an imperceptible boundary line in a river or lake? Is the common right of fishing which belongs to the people of this state within all that part of its territory on the easterly side of the main channel of the Mississippi subject to the laws of the state of Minnesota? There is no escaping the conclusion that if such is the case it is competent for that state to extend its police regulations as regards fishing and hunting over a large part of the waters of Lake Superior on the Wisconsin side, reaching up to the shore line, and for the State of Michigan to extend its laws on Lake Michigan on the same sub-

ject to the Wisconsin shore. We have searched in vain to find authority to sustain the affirmative of the proposition suggested. In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the territory of a foreign state under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never been successfully invoked to justify interference by one state or country with the enjoyment of the right to fish within the territorial boundaries of the others. It would be foreign to the necessities of the case to enter into a discussion regarding the limits of that jurisdiction. It is sufficient for this case that we have reached the conclusion that, while it refers to acts of a criminal or civil nature on the water, or acts in some way connected with the use of the water for navigable purposes, it does not extend to the right of one state by legislature enactment to govern the fishery rights of the people in a foreign jurisdiction."

Applying the doctrine of the above cases to the case at bar, it seems clear that a Washington court is without jurisdiction to proceed therewith. That the pending case is of a local character, the decisions and authorities cited in the argued heretofore made, clearly show. The Supreme Court of the United States in *M. & M. Railroad Co., supra.*, denied jurisdiction to the Iowa Court over that part of the bridge in Illinois, because the subject matter was in

the latter state. Here appellant sought protection of its right to land seines on that part of Sand Island to which it had a lease. Appellees had planted obstructions in front in such manner that it could not operate its seines. If appellant had a lease to that portion of Sand Island as alleged, then it was entitled to an injunction restraining appellees from interfering with such right to draw seines and land the fish taken, on Sand Island. The appellees contend that, by virtue of licenses from the state of Washington, they are authorized to locate and maintain their set nets in front of that island. But the entire **locus in quo** is in the state of Oregon. Whatever right the appellant had to the use of the premises between its lands and the channel of the river depends entirely on the laws of Oregon. Before the lower court could proceed with the case, it was necessary to determine first, with what rights or interests is the appellant vested in Sand Island, and, if it appears that it has a lease as alleged, and that it is a valid one, then, second, under the laws of Oregon what rights has the appellant, as such bank and shore owner, in and to the use of the frontage?

Suppose a case where the owner of tide land on the south shore of the Columbia River was seeking to restrain a person from driving piling or erecting other obstruction in front of such tide land. Would a Federal Court in Washington have jurisdiction of the cause? Certainly not, and yet such case would be in all respects the same as this one.

We take it that "concurrent jurisdiction" in civ-

il cases contemplates cases arising on the water where it might be difficult to determine in which jurisdiction the cause of action arose, as for instance, actions for personal injury resulting in the death of the injured party, the action being provided for by the statute. In such case the injury must have occurred within the territorial jurisdiction of the state, the statute of which is invoked. We have long been of the opinion, also, that it contemplates the right in each state to have its process in civil cases served any place on the water, though we admit that we can find no authority sustaining that view. So far as we have been able to ascertain, the courts hold that it applies only to cases arising on the water, such as we have instanced.

But, as above stated, we are confident no case can be found that supports the view that a court of one state can adjudicate property rights of parties arising out of claims of title to or the right to use or occupy certain premises, shore lands or locations in the river beyond the boundary line of such state. Such actions are local as clearly as if the premises were entirely on upland. That portion of the bed of the river within the boundary line of a state, is as distinctly a part of its territory over which its jurisdiction is exclusive, as the uplands within its borders.

In this case, appellant bases its right to recover, on its ownership to land above the high tide, on Sand Island; that island being as distinctly and absolutely Oregon territory as any of the upland south of the river. The action of appellees, if appellant's allega-

tions are true, is a trespass on the appellant's premises, on its property rights in Sand Island and the shore thereof. How could a Federal Court of Washington enjoin that trespass? Its process cannot guard the rights of persons in or to property beyond the boundaries of the State of Washington. It cannot send its officers into the State of Oregon to remove obstructions to the enjoyment of real estate in that jurisdiction. It is difficult to define the term "concurrent jurisdiction," as it is employed in these statutes, but it is not difficult, we respectfully submit, to see and understand that it has no application to and does not include jurisdiction in a case such as this.

This question has been determined by the Federal courts of both Washington and Oregon. We refer to the case of *In re. Mattson*, decided July 22, 1895, 69 Fed. 535 et seq. The facts in that case were that the petitioner Mattson was operating a pound net fish trap in the waters of the Columbia River north of the middle channel thereof, and entirely within the territory of the State of Washington, under a license from the state of Washington. Oregon claiming to act under the concurrent provisions of the act of Congress admitting it into the union enacted a law prohibiting pound nets to be operated on Sundays. Mattson operated this trap on Sunday. He was indicted by the Grand Jury of Clatsop County, Oregon, charged with the crime of violating the above statute and was tried before the court there and convicted. He then prosecuted a petition

for a writ of habeas corpus before the United States Circuit Court for Oregon. The matter being of considerable interest to both states, by request the Honorable C. H. Hanford, then United States District Judge for Washington, sat on the bench with the Oregon Justice, C. B. Bellinger, and the case was argued before the two judges, and it was there held that Oregon had no jurisdiction over a pound net fish trap erected beyond its territorial limits even though in the waters of the Columbia River.

It occurs to us this is decisive of this case. An examination of the pleadings will disclose this state of facts. The appellees base their sole right to operate a fixed appliance placed upon the bed of the Columbia River within the territorial boundaries of Oregon exclusively upon licenses issued to them by the Fish Commissioner of the State of Washington. This is their sole and only defense. They have no other defense. Therefore, if the Fish Commissioner of the State of Washington had no authority to grant a license beyond the territorial boundaries of his state, the appellees certainly had no locations whatever.

Section 5294, Lord's Oregon Laws, provides as follows:

“It shall be unlawful for any person or persons to operate or maintain, or leave in condition to take fish, in any of the waters of this state at any time hereafter any fish trap, weir, pound net, set net, gill net, fish wheel, seine or any device or apparatus or gear used in catching salmon fish or sturgeon with-

out first obtaining from the Fish Warden a license therefor as hereinafter provided. (Act 1901, page 338, Session Laws of Oregon.)”

Suitable penalty is provided for violation of the act. Therefore, the lower court had no jurisdiction over the cause of action, and the complaint, together with the answer of appellees and their cross-bills, clearly shows that the court was absolutely without jurisdiction.

It is true, that in a suit decided by the Supreme Court of Oregon hereinafter discussed, namely, Eagle Cliff Fishing Co., v. H. S. McGowan, et al., that court held the lower court had jurisdiction of the said causes of suit and counter claims. But this decision was based wholly upon the allegations in the bill of complaint and answers and cross complaints, that the premises in controversy were situate in the State of Washington. The correctness of such decision so founded upon the record in that case cannot be denied.

We do not question but that allegations of the complaint and cross-bills show the lands to be in Washington; but in this case, the record shows such lands to be in Oregon. Such being the admitted fact, we believe the lower court was without jurisdiction.

However, should this court disagree with us, without waiving this question, we respectfully submit was in error in denying appellant the relief demanded and in granting appellees any relief.

II.

THE APPELLANT DOES NOT CONTEND

THAT IT HAS THE EXCLUSIVE RIGHT TO FISH IN FRONT OF EITHER SITES 2 OR 3, NEITHER DOES IT CONTEND THAT APPELLEES DO NOT HAVE THE RIGHT TO FISH THERE. THE QUESTION AS TO WHETHER APPELLANT OR APPELLEES HAVE ANY FISHING RIGHTS IN SUCH WATERS IS NOT IN THIS CASE, AND CANNOT BE THRUST INTO IT, EXCEPTING IN THE MOST INCIDENTAL WAY.

The learned counsel for the appellees was successful in thrusting into this case on the hearing below a side issue, a proposition that it not in anywise involved herein and ought not be considered at all. All through the trial in the lower court, counsel for appellees craftily contended that this was a suit whereby appellant was attempting to establish in itself an exclusive right of fishery in front of the premises in controversy, and to exclude the defendants therefrom, and the lower court became obsessed with the same thought. Such is not the case. Appellant does not contend that it has any exclusive right of fishery in these waters. It does not contend that the appellees do not have the right of fishery therein, but concedes such right in each appellee—in fact, concedes that the public generally has the right to fish for salmon or other fish in front of said premises, and does not and never did contend that it can exclude any person whomsoever from fishing there.

The proposition contended for by appellant is this: that it is the lessee of all the tidelands adja-

cent to the two sites in controversy, through conveyances from the United States, the legal owner.

That, as such lessee, it has an appurtenant to such tidelands, the right of free access to and egress from said tide lands at all points fronting thereon, and that the appellees have wrongfully and without right or authority from any one erected, and are attempting to maintain in front thereof and between the line of low water and the line of navigability certain fixed structures, which interfere with its free ingress to and egress from the same. Appellant claims that such right, that is, access and egress, is a right appurtenant to the shore, and that it cannot be deprived of such right or interfered therewith, without due process of law, and that any interference therewith will be protected by injunction. That, if this contention is true, it does not matter what use appellant proposes to employ its property as long as such use is a lawful one. In this case, appellant desires to land its seines and boats thereon. And, in order to show that it has such right, it pleads a license to operate a seine in the waters of said river. It is for such purpose and such purpose only that the question of fishery can be thrust into this case. As we have said, the right of access to its property is an appurtenant to its tide land, and any interference therewith will be protected by injunction, and it matters not to the trespassing appellees what use the appellant proposes to employ its property. That is none of the trespassers' business. It would be a strange proposition, indeed, if before

the owner of real estate or an appurtenant thereto could exclude a trespasser therefrom he should be required to explain to the satisfaction of the trespasser not only the purpose for which it was desired to employ such property, but to further prove to such trespasser that the purpose was lawful. For the purpose of securing a preliminary injunction, it was necessary to show that appellant was suffering injury to its property rights, and that the further commission of such acts during the litigation would produce injury to it and its property. It was for this purpose that the proposed use of appellant's property was pleaded. Now, in order to defeat the injunction, it was cleverly and craftily suggested by appellees in the court below, and will doubtless, be claimed here, that the purpose of this suit was not to protect the appellant in its right of access, but to establish in it an exclusive right of fishery, and, therefore, in order to defeat appellant in establishing such exclusive fishery, it is necessary for this court to appropriate appellant's right of access and allow appellees to trespass upon and occupy appellant's frontage and exclude it therefrom. We repeat that no such question can be thrust into this case, for should the injunction prayed for have been granted, the appellees would still have the same right as the public to fish in such waters.

The proposition to be considered by this court is of vast importance. Many hundreds of thousands of dollars are invested in tide lands and in tide islands, whose value alone is the exclusive right to

draw seines thereover, and land seines thereon. And if any person armed with a license to catch fish shall have the right to thrust in and maintain permanent fixtures or structures in front of such tide lands, then these thousands of dollars which the citizens of such state have invested in such property will be turned over to a roving band of pirates. The right of tide land proprietors on the Columbia River to free and uninterrupted ingress to and egress from his frontage has been recognized for years, and such right protected by every Circuit Court in Oregon which has had occasion to pass upon the same. This is a part of the history of the jurisprudence of such state, and large sums of money have been expended and large property rights have been acquired based upon such construction, and we submit that strong must be the argument, and persuasive, indeed, must be the solicitor to induce this court at this day to overturn the acknowledged and accepted rule of property rights so long established and universally recognized and respected.

III.

THE RIGHT OF INGRESS TO AND EGRESS FROM TIDE LANDS ON NAVIGABLE RIVERS AND WATERS IS AN APPURTENANT TO THE LAND ITSELF AND CANNOT BE INTERFERED WITH OR THE PROPRIETORS DEPRIVED THEREFROM WITHOUT DUE PROCESS OF LAW, AND ANY INTERFERENCE THEREWITH WILL BE PROTECTED BY INJUNCTION.

The above doctrine is universally announced by every court in the world without exception. It is laid down by all text writers, and denied by none.

Gould on Waters, Section 149, lays down the following doctrine:

“Riparian rights exist on the banks of navigable waters, as well as of non-navigable streams. In the former case, they are subordinate to the public right of navigation * * *. The rights actually exercised by the proprietors of land on the shores of tide water are often dissimilar from those enjoyed by proprietors above the flow of the tide * * *. But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded to him to the water for the purpose of using the right of navigation. This right of access is his only and exists by virtue and in respect of his riparian property. * * * This riparian right is property and is valuable, and although it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with the established law and if necessary that it be taken for the public good upon due compensation.”

Lewis on Eminent Domain, Section 77 et seq. 83, lays down the same doctrine. Judge Lewis summarizes the decisions and announces his conclusions as follows:—

“Section 83. In conclusion, the following rights may be enumerated as appurtenant to property upon public waters.

First: The right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.

Second: The right of access to the water, including a right of way to and from the navigable water.

Third: The right to build a pier or wharf out to navigable water, subject to any regulations of the state.

Fourth: The right to accretions or alluvium.

Fifth: The right to make a reasonable use of the water as it flows past or leaves the land.”

This eminent author lays down the doctrine that any interference with this right of access is an interference with the right of property and is a taking within the constitutional limitations providing against the taking of property without due compensation.

Judge Cooley in his work on constitutional limitations, page 544, in discussing this right of access, uses the following language:

“So far as these cases hold, if competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation.”

In Angell on Water Courses, a very valuable note is found on pages 372-3, in which a large num-

ber of authorities are collated, and it is there announced by the author as his judgment that the right of ingress to and egress from the shore of a navigable water is appurtenant to the land, and any interference therewith can be enjoined at the suit of the riparian proprietor.

This author, in section 67, announces the following doctrine:

“The riparian proprietor has the sole right, unless he has granted it, to fish with nets or seines in connection with his own land.”

“It was expressly held in *Lay v. King*, in the Supreme Court of Connecticut, that a riparian proprietor on the river Connecticut near its mouth had an exclusive right to draw a seine on his own land, although the right of fishing on the water was free and common to all of the citizens of the state. This exclusive right is considered to give all the owners of land on the margin of the river Schuylkill such advantage that it has been hardly worth while for any person to attempt to fish with seines.”

“The right of property in front of a river, is therefore, valuable and is called a fishery and one which, in some places, is rented for a considerable sum of money.”

Further along in the same section, this author announces the following doctrine:

“The right of landing with and drawing seines upon another’s land is, undoubtedly, an easement, and, therefore, as in the case just above referred to,

may be acquired by prescription, like a right of way."

Gould on Waters approves this doctrine. Section 100, where this author says "a littoral proprietor has exclusive right to draw a boat or seine on his own land", citing *Skinner v. Hettrick*, 73 N. C. 53; *Hettrick v. Skinner*, 82 N. C. 65-68; *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

Farnham on Water and Water Rights, the latest work on the subject, announces the doctrine that the owner of shore on a navigable water as an appurtenant thereto has the right of access thereto, and any interference therewith will be enjoined by injunction.

3 Farnham on Water and Water Rights, Sec. 872.

1 Farnham on Water and Water Rights, Sec. 66.

In *Carli v. Stillwater etc. Ry. Co.*, 28 Minn. 373; 10 N. W. 205, Clark, Justice, says "the owner of land bounded by a navigable stream has the right by virtue of the ownership of the bank to enjoy free communication between his abutting premises and the navigable channel of the river * * * and to this extent, is entitled to the exclusive occupancy of the bed of the stream, subordinate and subject only to the rights of the public with respect of navigation and such needful rules and regulations for their protection as may be prescribed by competent legislative authority, and such riparian rights are property and cannot lawfully be taken for public use without just compensation."

The Supreme Court of Idaho, in *Shepherd v. Couer-d-Alene Lumber Co.*, 101 Pac. 591, through Ailshie, Justice, says: "Navigable streams are public highways over which every citizen has a natural right to carry commerce, whether by boats or the simple floating of logs, * * *. The right of a riparian owner to use a stream implies the necessity, as well as the right, to pass from the shore to the navigable waters of the stream, and this in turn must require some effective means or medium by which to reach such point for loading or unloading the commercial and floatable commodity."

Further on, this same court says, "the right of ingress to and egress from the lands of a riparian owner is a property right and must be respected, and for the protection of which, the courts will afford a remedy."

The Supreme Court of the State of Missouri, in *Hobart-Lee Tie Co. v. Stone*, 117 S. W. 604, through Reynolds, Justice, announces the following doctrine:

"The owner of land bounded by a navigable river has the right of access to the navigable part of the river in front of its premises and the right to use of the waters for all purposes not inconsistent with the public right of navigation therein."

The same doctrine is announced by the Supreme Court of California, in *Shirley v. Bishop*, 67 Cal. 543, and *San Francisco etc. Union v. R. C. R. etc. Co.*, 144 Cal. 134; 77 Pac. 823. In the latter case, is announced the following doctrine:

"The erection of obstructions below ordinary high

water mark in front of land of a littoral proprietor whose land abut on the ocean, which obstructions interfere with and prevent access to and use of the ocean highway by the littoral proprietor constitutes a private nuisance as to him, and he may maintain an action to abate it."

The Supreme Court of the State of Wisconsin, in *McCarthy v. Murphy*, 119 Wis. 150; 96 N. W. 531-532, lays down the following doctrine:

A riparian proprietor "as proprietor of the adjoining land and as connected with it, he has the right of exclusive access to and from the waters of the lake at that particular place. He has the right to build piers and wharves in front of his land out to navigable waters in aid of navigation not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses distinct from the rest of the public."

"An intrusion of another's riparian rights is a legal wrong which the law will redress, nor can a stranger by such intrusion on the bed of the water acquire any vested rights or interests as against the riparian owners. Any structure erected by him under such circumstances is a private nuisance."

The leading case on this subject is *Yates v. Milwaukee*, 10 Wall. 479; 19 L. ed. 984.

Justice Miller announces the following doctrine:

"Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream—and among

these rights are access to the navigable part of the river from the front of his lot * * *."

"This riparian right is property and is valuable, and that it must be enjoyed by due subjection to the rights of the public and cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with the established law and if necessary that it be taken for the public good upon due compensation."

We have yet to discover a single author, or the decision of any court, holding contrary to the doctrine above contended for. The authorities are numerous and uniform that the rights of a riparian proprietor, among other things, includes the free and unobstructed ingress to and egress from his shore line. That this is property and any interference therewith will be protected by the courts.

In the case of *Hume v. Rogue River Packing Co.*, 51 Or. 240, the lower court held that Mr. Hume, as a riparian owner, had the right to complain against and enjoin a set net location exactly similar to the set nets sought to be placed in front of plaintiff's premises here, placed in front of Mr. Hume's tide lands between ordinary water mark and the navigable channel and same were a private nuisance, as to Mr. Hume, and an injunction was issued. The attorneys for Mr. Hume and the attorneys for the Packing Co. and all parties interested conceded such to be the law. Judge Hamilton tried this case in the court below and held under identically the

same state of facts disclosed by appellant's bill of complaint here, that plaintiff was entitled to his injunction. Judge Hamilton held a tide land owner had the exclusive right to draw seines upon his land, and that any person placing any structure or fixed appliance in front of his land which in anywise interfered with the drawing of such seines was a private nuisance, for which an injunction was issued.

The same doctrine was held in the case of *Hume v. Turner*, 42 Or. 202. The rule here contended for has become a part of the jurisprudence of Oregon. The latest case involving this question which, if followed by this court, is decisive, is *Eagle Cliff Fishing Co. v. McGowan, et al.*, 137 Pac. 766.

As we understand the law applicable to this case, the decision of the Supreme Court in *Eagle Cliff Fishing Co. v. McGowan*, is binding upon this court and is decisive in this case. The facts in the *Eagle Cliff Fishing Co.* case are identical with the facts in the case at bar, and every legal proposition involved in this case is decided adversely to the appellees. The only difference in the two cases is that in this case the appellees claim the right to maintain fixed fishing appliances in the bed of the Columbia River, within the territorial boundaries of Oregon, under a license to construct and operate such appliances issued by authority of the State of Washington; otherwise, the two cases are identical. In the *Eagle Cliff Fishing Co.* case, that company acquired in 1912 a lease from the United States, through the Secretary of War, pursuant to the said

Act of July 20, 1847, to these same Sites 2 and 3, together with Site No. 1. It immediately obtained a license to operate seines on such sites from the Master Fish Warden of Oregon pursuant to the laws of such state. It had made all arrangements for operating seines thereon and took its outfit down upon the island, and when it arrived there it found that the appellees in this case, H. S. McGowan, Erick Lindstrom and J. P. Coyle, together with three brothers of appellee H. S. McGowan, namely John McGowan, James McGowan and Charles McGowan, had placed in the waters of the Columbia River, in front of the shore to said sites and between such shore and the navigable channel of the river, a large number of buoys and anchors. The Eagle Cliff Fishing Co. immediately instituted a suit in the Circuit Court for Clatsop County where it obtained a preliminary injunction, enjoining them from maintaining such obstructions, and they were accordingly removed. The defendants in that suit appeared and interposed an answer, claiming that the structures complained of were buoys and anchors upon which it was proposed to operate set nets and seines, and each party claiming a superior right to do so, because of the fact that the licenses obtained by them anti-dated the licenses obtained by the Eagle Cliff Fishing Co., and because of the fact that locations had been made by them prior to locations made by the Eagle Cliff Fishing Co., and also upon the ground of prior occupancy by the McGowans—in fact, the same defense was interposed by the Me-

Gowans in that suit that was interposed by the appellees in this suit, with the exception only that each party was armed with licenses issued by authority of the State of Oregon. The Eagle Cliff Fishing Co. claimed that it was the owner of the shore and tidelands, and as such owner, as an incident thereto that the private right of access to every part of the water bordering thereon the navigable channel of the river, and that this was properly right and could not be taken from it without due process of law. This is precisely the claim made by the appellant in this suit. The matter was tried before the Circuit Court for Clatsop County, State of Oregon, resulting in a decree in favor of Eagle Cliff Fishing Co. against the McGowans and defendants in that suit, whereby each was enjoined from further maintaining the obstructions complained of. An appeal was taken from such decree by the defendants to the Supreme Court of the State of Oregon. Some of the ablest attorneys of the State of Oregon appeared for the McGowans, and the matter was exhaustively briefed and argued before the Supreme Court, and every proposition that has been suggested here was suggested there; but the Supreme Court of the State of Oregon held that the licensee of the United States to Sites 1, 2, and 3, on Sand Island, was entitled of right to the free and unobstructed ingress to and egress from such shore to the navigable channel of the river, for the purpose of hauling and landing seines from the water, and for the purpose of launching the same from the shores into the

water, and that under the laws of the State of Oregon, one armed with a license to operate a set net or fixed appliance was not authorized to erect or maintain one in front of such tideland owner.

Mr. Justice Moore in discussing the case laid down the following proposition:

“As an incident to the lawful occupancy of lands, one border of which is the low water line of the Columbia River, the plaintiff had the private right of access at such sites to and from that stream. *Micelli v. Andrus*, 61 Or. 78, 120 Pac. 737; *Van Dusen Inv. Co. v. Western Fishing Co.*, 63 Or. 7, 124, Pac 677, 126 Pac. 604. In *Yates v. Milwaukee*, 10 Wall. 497, 504 (19 L. ed. 984), Mr. Justice Miller, discussing the question of access to the navigable part of a river says: ‘This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for public good, upon due compensation.’ In that case the right of access was recognized as pertaining to the upland owner. *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, 21 L. ed. 798. The right is here referred to, however, in order to show its acknowledged importance to the person lawfully entitled thereto.

Upon the admission of Oregon to the Union February 14, 1859, the state took the title to all that part of the bed of the Columbia river, near its mouth,

that is situate south of the middle of the north ship channel of that stream. 11 Stat. 383, c. 33. The margin of Oregon's ownership of the bed of a navigable stream is the mark made on its bank by the line of ordinary high water. *Micelli v. Andrus*, 61 Or. 78, 84, 120 Pac. 737, and cases cited. Subject to the paramount right of navigation, the state, pursuant to legislative enactments, has been authorized to sell and convey any part of its land lying between ordinary high water and low water, and the grantee of such tidelands is the riparian proprietor to the exclusion of the upland owner. *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154.

Though the right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state, the tideland owner on such a stream has the exclusive right to draw a seine on his own land. *Hume v. Rogue River Packing Co.*, 51 Or. 237, 244, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732. While in the case at bar the sole privilege thus adverted to is held by the plaintiff in consequence of its possession of the demised premises, which right is undoubtedly of great advantage in landing salmon entrapped by a seine, such lawful occupant of the sites mentioned is not entitled to, and cannot exercise at such place, any prerogative in the manner of catching such fish differing from that which can be legally asserted by every other citizen of the state. *Hume v. Rogue River Packing Co.*, *supra*.

The buoys placed in the river to indicate the lo-

cation of the lines intended to be occupied by the set nets, and the large rocks by means of which such floats were anchored, and the buoys fastened to the cable, if allowed to remain in the stream, would necessarily have prevented the plaintiff from hauling its seines to the shore. Notwithstanding such obstructions, it is contended by the defendants' counsel that the state, being the owner of the bed of the river, had, as an exercise of its police power, authority to grant an exclusive right of fishing in front of the sites described; that, their clients having obtained the prior licenses to catch salmon in the manner described, their privilege in this respect is superior to all others; that the spaces of 550 to 900 feet within the lines selected for the set nets afforded the plaintiff reasonable access from the tidelands to navigable water; and that the cable which lay on the bed of the stream did not constitute any obstruction to such right of passage. Based on these assertions, it is insisted that an error was committed in granting the relief prayed for in the complaint, and that an affirmance of the decree would be tantamount to giving plaintiff the exclusive right of fishing in front of Sand Island.

The provisions of the statute regulating the catching of salmon may be summarized as follows: The Governor, the Secretary of State, and State Treasurer, constitute the board of fish commissioners, whose duty it is to appoint a master fish warden. L. O. L. Sec. 5272. The fish warden is required to collect all license fees, and pay the same to the State

Treasurer, to be placed in the hatchery fund to be used for hatchery purposes. Id. Sec. 5283. It is unlawful for any person to operate in any waters of the state a set net or a seine without first having obtained from the fish warden a license therefor. Id, Sec. 5294. It is unlawful for any person to fish for salmon in any waters of this state, unless he is a citizen of the United States, or has declared his intention to become such, and, for a period of six months, has been a bona fide resident of the State of Oregon or of another state bordering upon the Columbia river. Id. Sec. 5298. Certain sums of money are annually collected from persons operating set nets, gill nets, seines, etc., and from cannerymen of, and from dealers in, salmon for licenses granted for that purpose. Every license so issued is required to be numbered and dated, and shall terminate on the 31st of March following its issuance. Id. Sec. 5203. Any person having obtained a license to operate a set net shall cause to be placed and maintained on the bank of the river, or upon a buoy securely anchored in the stream on the location claimed, the number of such license, and for a seine he shall also cause to be placed and maintained on the seining ground the number so designated by the master fish warden. Id. Sec. 5304.

Evidently the purpose of the statute in thus licensing persons engaged in catching salmon in nets and by seines was to protect such individuals from intrusion by non-resident fishermen who came to this state during the open season to pursue their occu-

pation, and not particularly to designate, with respect to such means of taking fish, the places where the business might be conducted. The sums of money obtained by issuing such licenses were undoubtedly designed to create a fund to be used in propagating such species of fish, in order that the supply might not be wholly exhausted. Although the statute specifies the location claimed by the licensee of a set net must be evidenced as indicated, the enactment does not expressly provide that the privilege so bestowed shall be exclusive as to such place. An exclusive right of fishing in a navigable stream cannot be granted to any person by a state, under a Constitution like ours, forbidding the creation of monopolies in the pursuit of a lawful undertaking. *Hume v. Rogue River Packing Co.*, 51 Or. 237, 259, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

It is believed that the obstructions placed by the defendants in the Columbia river were not authorized by statute, and that they tended to create an exclusive right of fishing, the continuance of which was properly enjoined. Nor is it thought that plaintiff, by reason its sole right to draw a seine upon its own ground, will be granted an exclusive right to catch salmon at the place indicated, for the testimony shows that fishermen operating gill nets made drifts in front of and behind such seines when they were being operated.

The defendants had intended to remove any salmon that they might catch in a seine to a boat

moored to the cable. Their right to tow a seine over the same ground is admitted; but they must remove the salmon thus caught upon a steamer or other craft adapted to that purpose.

Believing that the decree is a correct adjudication of the rights of the parties, it is affirmed."

Therefore, in Oregon a riparian owner owns the free right of ingress to and egress from his premises, and according to the decision of its courts, has the right to enjoin the placing of set nets in front of his shore and between the shore and the line of navigability of the navigable waters fronting thereon. This being true, we submit that this is binding upon the Federal courts, and this court must follow the rule announced in the Eagle Cliff Fishing Co. case as above set forth.

IV.

RIGHTS OF RIPARIAN PROPRIETORS
ARE DETERMINED BY THE LAWS OF EACH
STATE AND THE DECISIONS OF ITS COURT
OF LAST RESORT.

No principle is better settled than that the right of a riparian owner is determinable entirely by the laws of each state and decisions of its court of last resort, subject only to the paramount right in congress to control commerce and navigation, and that the entire subject of the rights of riparian proprietors and the limitations thereof are left entirely to the states, and the Federal Courts are bound to follow the rulings and decisions of the state courts in their interpretation of such rights.

In *Hardan v. Jordan*, 140 U. S. 242-250; 11 Sup. Ct. Rep. 808-858, Justice Brewer says: "Beyond all dispute, the settled law of this court established by repeated decisions is, that the question how far the title of a riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of its highest court furnish the best and final authority."

Again, in *Illinois Cent. R. R. v. Illinois*, 148 U. S. 387 et seq.; 13 Sup. Ct. Rep. 110, Justice Fields says:

"It is the settled law of this country that the ownership of a dominion and sovereignty over lands covered by tide waters within the limits of the several states belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, and that can be done without substantial impairment of the interests of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among states."

These cases were followed by the case of *Shively v. Bowlby*, 152 U. S. 1; 14 Sup. Ct. Rep. 548-565, where the doctrines above announced were quoted with approval. The authorities announcing this doctrine are too numerous to occupy any time in discussing them. If this court desires further citation on this point, cite Vol 8, Ency. of U. S. Sup. Ct. Rep., pages 840-841, where the author of that excellent work lays down the rule as follows:

“The question is now of state regulation, subject to the paramount control of congress for commerce and navigation.”

In the light of the decision in the case of *Eagle Cliff Fishing Co. v. McGowan, et al.*, supra., and the rule so frequently announced by the Supreme Court of the United States above referred to, we submit there can be but one conclusion reached in this case, namely, that the judgment of the lower court must be reversed. Should the court, however, refuse to follow the rule announced by the Supreme Court of Oregon we submit that under the pleadings, evidence and law, the lower court was in error and must be reversed.

Appellees were violators of the laws of Oregon. Under the laws of the State of Oregon at the time appellees claimed to have made locations of their set nets, and during the entire period which they claim they were damaged because of the fact they could not operate them, they were violators of the laws of Oregon.

Section 5294, Lord's Oregon Laws, reads as follows:

“It shall be unlawful for any person or persons to operate or maintain, or leave in condition to take fish, in any of the waters of this state at any time hereafter any fish trap, weir, pound net, set net, gill net, fish wheel, seine, or any device or apparatus or gear used in catching salmon fish or sturgeon without first obtaining from the Fish Warden a li-

cense thereof as hereinafter provided. (Act 1901, page 338, Session Laws of Oregon.)”

The evidence in this case shows clearly that neither of the appellees complied with the above statute, and neither attempted to comply.

As we have stated, the appellees base their entire claim for damages upon rights to operate set nets located under a license from the State of Washington, and in direct violation of the laws of the State of Oregon. Upon what principle can such a claim be sustained? Can any one base a right of action in direct violation of an express statute? It is unnecessary to cite authorities in support of this proposition. Under the laws of Oregon, neither of the appellees was entitled to operate set nets. If they had no such rights, then they could not be damaged by the removal of the set nets. But should the court be of the opinion that appellees nevertheless were entitled to compensation because of the fact that the appellant prohibited them from operating set nets in front of these sites, it then becomes important to determine whether or not the evidence shows that the appellees suffered any damages, that is, conceding that they were wrongfully deprived of the use of their set nets. We submit that an examination of the evidence in this case will show that if the appellees were damaged, they failed to offer any legal testimony showing it. We believe an examination and discussion of the findings of facts made by the special master and confirmed by the lower court will convey to the court

a clear idea of our position, as well as the evidence offered in support thereof. It will be remembered that upon the filing of these findings, appellant, through its attorney, interposed proper exceptions, and these exceptions are properly set forth in our assignments of error.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

In the opinion handed down by His Honor Judge Donworth, prior to the appointment of a special master to take additional evidence and report findings of law and fact, page 172, Transcript of Record, the rule for the measure of appellees' damages understood by him was announced. Not only that, but the court clearly stated that the estimated number of fish appellees thought they might have caught in their set nets and how much profit they guessed they would have made thereby were too conjectural and could not be the rule for the measure of appellees' damages, to be followed by the master. The master was instructed to determine the fair rental value of the set net locations, and when this was determined from the evidence, such would be appellees' damages.

The special master, however, overruled Judge Donworth, and held that the damages sustained by appellees was to be determined solely and exclusively from the number of fish which they estimated they could have caught by the use of their set nets on their set net locations, and accordingly found that they could have caught during the years 1908, 1909,

1910 and 1911, 518 tons of fish of the value of \$130.00 per ton, aggregating \$22,360.00. Upon the cause being referred to a special master, the appellees instead of following the rule announced by the court ignored it entirely, and offered evidence cumulative only of that theretofore offered, and which the court, after due consideration, had held incompetent, and the special master, likewise, ignored the decision of said court and found in direct opposition to the court's ruling. Judge Donworth having retired, the findings of the special master and exceptions thereto were heard before Honorable Edward E. Cushman, who likewise overruled Judge Donworth, and adopted the same rule for the measure of appellees' damages announced by the special master, and approved the findings with a slight reduction in the amount.

V.

CUSTOM.

After the cause was referred to the master under the decision of Judge Donworth, appellees entirely changed their theory, and abandoned their original claim as to their damages, and attempted to offer proof of an alleged **local** custom among trapmen and some fishermen to charge as rental for their fishing locations one-third of the catch where the lessor furnished the gear, and two-thirds when gear is furnished by the lessor. We think such evidence was not within the issue.

APPELLEES' CROSS-BILLS.

The appellees in their cross bills, at great length, prolixity and particularly plead their claim for damages, and their entire plea is that their entire damages consists in the number and value of the fish which they could and would have caught had they been permitted to operate their locations. Nowhere is the rental value, or the value of the use of the premises, averred.

Therefore, under their pleadings, they are not entitled to prove any alleged custom. Of course, our contention has been all along that the appellees having in their cross-bills alleged their damages to the date of filing their bills could recover no damages occurring thereafter. But be that as it may, proof of a local custom was not competent under the issues.

VII.

LOCAL CUSTOM MUST BE PLEADED.

As we have stated, this alleged custom as claimed was local, and, as we understand it, in order that appellees should take advantage of it, they must have plead it. This seems to be the general rule.

22 Ency. Pldg. & Prac., pg. 406 and cases cited.

But outside of the question of pleading, we repeat that there is not in this record a scintilla of competent evidence supporting a finding of a custom.

VIII.

CUSTOM OF 1912.

Furthermore, the evidence of every witness as to this alleged custom or rule was taken during the month of April, 1912. An examination of the evidence of all of appellees' witnesses as to this alleged custom will show that they all testified as to an alleged custom or rule which prevailed then. Not one was asked as to whether such custom or rule prevailed prior to 1912.

In fact, there is no evidence that this alleged custom or rule prevailed at any time or any place other than in the imagination of three of appellees' witnesses, and this not to set net locations.

IX.

PROOF OF CUSTOM AND USAGE.

Custom or usage cannot be proven simply by the personal opinion of witnesses. Custom, if it exists, must be proven as a fact the same as any other fact. The opinion of a witness cannot establish such fact. This is fundamental.

Greenleaf on Evidence (13th ed.) Sec. 252. This author, in discussing this question, says:

"Both custom and usage must be proven by evidence of facts, not of mere speculative opinions, and by witnesses who have had frequent and actual experience of the custom and usage, and do not speak from report alone."

3. Ency. of Ev., pg. 958, and cases cited.

The evidence shows that never in the history of

salmon industry on the lower Columbia River has a set net location ever been leased or rented.

The witnesses who pretended to testify concerning a custom or rule knew and spoke of pound nets, seining locations, and boat and gill net appliances, and none other, and gave it as their opinion that it, as a matter of law, applied to set net locations.

It is a rule of universal construction, that custom can only be established by facts showing its existence for at least a sufficient length of time to have become generally known, and this is for the court to determine from the facts. Jones on Evidence, Sec. 463.

There is absolutely no evidence showing, or tending to show, that this alleged custom or rule had ever existed at all, excepting in the minds of the witnesses themselves, and then only whilst on the stand.

In *Armstrong v. Lake etc. Co.*, 147 N. Y. 495, 42 N. E. 186, the Supreme Court of New York, through Andrews, C. J., says:

“That custom must be collected **not from what witnesses say** they think the custom is, but from what was publicly done throughout the district.”

In *Horan v. Strachn, et al.*, 86 Ga. 408, 12 S. E. 681, the Supreme Court of Georgia, through Summons, J., in discussing the rule of custom says:

“None of the witnesses cite any instance where any commissions or disbursements were charged and allowed to one who did not furnish the money.

It is true that most of the witnesses gave it as their opinion that the person in charge of the ship would be entitled to the commission, but custom is not a question of opinion, but of fact, and cannot be proved by the opinion of witnesses that it ought to be so and so."

It must be proved that the custom exists, that it is a fact. The court and jury cannot act upon the opinion of witnesses, they must be guided by that which has been the practice **and no witness testified to any instance where the agent had received these commissions.**

The correctness of the above rule contended for by us has been clearly established in Washington. We refer to the case of *Williams v. Ninemire*, 23 Wash. 593; 63 Pac. 534-538, where Justice White says:

"Usages being a fact, and to be proved as a fact, it follows that the existence of a usage cannot be established by the mere opinions of witnesses as to what the law is, as applied to the case in hand. It often happens that what is supposed to be a usage of trade is merely the general opinion of persons as to their rights and liabilities under certain facts. Such opinion cannot constitute a usage. * * * It must be a method of dealing with certain facts, and not a conclusion as to the rules of law pertaining to those facts. 27 Am. & Eng. Enc. Law, 736. See also *Cox v. O'Riley*, 58 Am. Dec. 633; *Press Co. v. Standard*, 100 Am. Dec. 255."

Now, no witness in this case testified to any

instance where this alleged custom had been acted upon, as to any character of fishing appliance, or location, and especially is this true as to set net locations, and no instance could be cited for the reason none had occurred.

X.

FINDINGS ARE NOT SUPPORTED BY ANY EVIDENCE.

The truly astonishing thing is, that the findings of the special master as sustained by the court below, excepting only as to the quantity and value of fish caught by appellant during the years 1908, 1909 and 1910 (but not 1911), and the fact that appellees were not permitted to operate set nets on their alleged locations, are not supported by a scintilla of competent evidence. We make this statement without any qualifications whatever, and shall endeavor to demonstrate its accuracy.

(1) We will first consider findings No. I and II.

These findings are in effect, that according to a custom long established among fishermen on the Columbia River, the rental value of a fishing location is determined for rental purposes as follows: Where the owner rents the ground alone, one-third of the value of the fish taken, but where he furnishes all gear, then the value of two-thirds of the fish is the rental value, and that such rental value cannot be ascertained until the end of the fishing season.

There was not a single witness that testified that he ever knew or heard of a set net location on the lower Columbia River being rented under any circumstances whatever. In fact, every witness on behalf of appellees testified that they never knew or heard of any set net being operated on the lower Columbia River during the regular spring or fall salmon fishing season. They all testified that salmon fishing on the lower Columbia River was conducted exclusively by seines, gill nets and fish traps generally known as pound nets, and it is to such and such only any evidence was given on their part. Two witnesses testified that they heard of some few set nets being operated simply to catch a few fish during the winter season, one sometime in 1860 or 1870. The other, Amon Markham, operated one himself, and succeeded in catching five fish only. But no testimony can be found in the record of any set net location being rented on any terms on the lower Columbia River.

The only evidence offered on this theory was taken before the special master. The appellees called as witnesses there: Frank Woodfield, Amon Markham, Ralph Grable, Moses Hirschey, and appellee H. S. McGowan.

FRANK WOODFIELD.

This witness neither testified nor was he interrogated upon this subject.

AMON MARKHAM.

The testimony of this witness covers pages 460

to 494, Transcript of Record. We cannot hope to incorporate it all here.

This witness testified that he had been engaged in fishing on the Columbia River for about 34 years, with the exception of four years, when he was deputy sheriff of Pacific County, Washington.

On page 462, this witness gives his judgment of the number of fish he could have caught, had he the exclusive right to operate all of appellees' set nets on their locations—35 tons.

By skillful and leading questions, he was later, and on page 465, led to say, if he could have the right to operate 18 to 36 set nets there, then he could catch almost as many fish as a drag seine. Later on, he guaranteed he could do so.

On page 466, he testified that he had operated set nets in the Columbia River.

On cross examination, however, pages 469, 470, his numerous set nets dwindled down to one, which he operated opposite Sand Island, in the Oklahoma channel, and he only caught 5 fish.

He also testified that he had heard of three gentlemen who operated set nets off the south shore of Sand Island. He did not know their names.

He also testified that he never saw a set net in front of the south shore of the island, excepting the alleged set nets placed there by appellees.

We call the court's attention to the testimony of this witness on page 487. After testifying that he was a fisherman by occupation, living at Ilwaco, Pacific County, Washington, a village of fishermen,

that his associates were all fishermen, and he had followed fishing for 34 years last past, he testified as follows on page 487, Transcript:

Q. Now during that time, how many set nets do you know of, of your own personal knowledge, not what you have heard, were operated on the lower Columbia River?

A. On the lower Columbia River?

Q. Yes.

A. Why I don't know. There is a question I won't answer, because I don't know.

Q. Can you recall one?

A. No, I would not answer that—only one of my own—I have operated a set net a few days during the early spring, that is all.

Q. Just a few days?

A. Yes sir, I would not tell you something I do not know.

This witness, according to his own sworn testimony, had operated but one set net in the waters of the Columbia River, and then only for a very few days, and in which he caught five fish, and quit because it was a failure. And this set net was operated in front but on the west side of Sand Island.

He testified that he had never seen any set nets operated on appellees' alleged locations. He said he had heard of some being operated there, but did not know by who, or whether any fish were caught therein. He evidently had reference to the efforts of appellees.

We know of no principle of law or evidence

which would permit this witness to give his opinion as to the number of fish that set nets could catch if operated there. He was not an expert in that line, had no experience whatever.

The evidence of this witness may be searched in vain for any expression of opinion as to custom.

He was asked, page 469, if he knew what the value of fishing locations are for rental purposes, to which he answered 33-1-3 per cent. We objected to this question and answer, and questioned this witness as to his qualifications, as follows: (page 470)

Q. Do you know of any set net sites being rented on the Columbia River?

A. I do.

Q. Where? * * * I am talking about set nets, Mr. Markham. Please keep in mind set nets. * * * Do you know of any man renting or paying anything for the purpose of operating a set net on the Columbia River?

A. Yes, sir, I have.

Q. Who?

A. I can show you.

Q. I said who?

A. Mr. Brown for one.

Q. Who did he rent from?

A. I don't know. Mr. Firberg, I believe.

Q. He rented a set net location from Firberg?

A. Yes, sir.

Q. Where?

A. I don't know.

Q. That was about 1860 or 70?

A. In all probability, it was.

This witness, of course, was incompetent. But he, nevertheless, testified that it was a **rule** on the Columbia River to pay to the owner one-third of the fish caught, and if rentor furnished all gear, two-thirds of the catch.

This was simply an expression of the opinion of the witness. No facts were testified to, neither did the witness show any knowledge of this alleged rule.

He was not asked, neither did he testify, concerning a custom. But had he been asked, he certainly was not qualified. Now, he said he had heard of but one man renting a set net location, the location being to him unknown, and during the year 1860 or 1870. Yet, he was glib to testify that it was the rule for fishermen to deliver a certain percentage of fish caught on leased premises to the owner, without regard to the character of the premises. Having neither known, nor heard of any such transaction, it logically follows he could not truthfully so testify, and, as a matter of fact, he could not so testify. The witness himself was incompetent. Therefore, it was not from this witness that the findings were based.

RALPH GRABLE.

The testimony of this witness covers pages 494 to 533, Transcript of Record. It was surely not from his testimony that these findings can find support.

This witness resides in Ilwaco, Washington,

and is 34 years of age, and has been engaged in salmon fishing on the Columbia River since he was 15 years old.

On page 496, he says, he never leased any set net locations. The testimony of this witness as to custom is worthless, for he testified to nothing that is competent.

MR. WELSH:

Q. Are you familiar with the custom among fishermen on the Columbia River as to the price that shall be paid for the leasing of fishing locations?

A. I think I am, sir

* * *

Q. What is it?

A. I think that any man that leases ground from another, or the man that furnishes gear for another man to fish within the same as grounds, we consider it that way, the man who furnishes grounds without gear, he is entitled to 33-1-3 per cent.

Q. Of what?

A. Of the gross catch, and the man that furnishes the gear and grounds both, he gets 50 per cent.
That has always been my way of leasing.

This witness was not interrogated as to whether or not there was any custom in this regard. He was simply asked if he was familiar with a custom. This alleged custom was simply assumed.

But this witness qualified his answer by saying that was always the way he leased fishing grounds, and it must be remembered he never leased or heard

of any one leasing a set net location on the lower Columbia River.

Surely, no lawyer would contend that this was proof of any custom. It could not possibly be from this witness that these findings were predicated.

MOSES HIRSCHHEY.

This witness did not testify, nor was he interrogated as to any custom.

H. S. McGOWAN.

The testimony of this witness may be searched in vain for any expression as to any custom.

At page 563, Mr. McGowan testifies as follows:

Mr. WELSH:

Q. Do you know the value of the use and occupation of fishing locations for a year?

A. Yes, generally speaking, I do. Of course, that depends a good deal upon having pretty accurate knowledge of what the location is that is in question.

Q. Now, will you state what it is?

A. The general rule is to this effect, that any **good standard fishery**, I am not talking about any bum fishery. I am talking about a good **standard fishery**. That one-third of the gross catch goes to the owner of the fishery, provided that the man that leases from him and operates it furnishes everything, but if the man that owns the fishery rights furnishes the outfit and gear and all that, and the other fellow carries it on, there is a square division of half and half.

Q. Do you know the market value of this leasehold or rental?

A. Well, the market value is according to the rule I have just told you, would be one-third of the gross catch.

This witness further says, that this rule would in his opinion apply to the locations in controversy.

Now, this witness testified that he thought the appellees with their 8 set nets could and would have caught about two-thirds as many fish as were caught by appellant in its numerous seines.

This witness testifies that he had operated on the locations in question 3 out of 8 of the set net locations for a week or ten days—he could not remember—but they might have been operated two weeks, yet not one fish was the result of these two weeks of effort. It does not require any great knowledge of mathematics or much time to compute the number of fish that could have been caught on these locations during the season. These were the only set nets ever operated on these grounds, and this witness says they were shifted from one position to another, covering the entire territory. Yet, the result, nil.

In the face of such facts, in the face of this evidence, the court below found that these same nets would have caught during that season 150 tons of fish.

The findings as regard to custom could not have been predicated upon any evidence given by this witness.

ERICK LINDSTROM.

This witness did not testify as to any custom. This witness was asked, if he knew of any rule as to prices paid for leasing fishing grounds. He testified he had never leased any himself. But P. J. McGowan and Sons had leased grounds on the upper river by giving one-half of the catch for the lease.

This witness nowhere says he has any knowledge of any rule, but explains certain personal transactions which had come, in some manner, to his knowledge. But this witness did not at any time say that he had knowledge of any rule. The only experience he had was in regard to a set net on the upper Columbia River which his brother leased from P. J. McGowan and Sons. This was all he knew about this alleged rule.

This witness gives it as his opinion that had he alone been permitted to operate his set nets, he would have caught 600 tons of fish during the year 1908, and, consequently, the rental value of his 3 set net locations, in his judgment, for that year was \$26,000.00.

This statement was made in face of the fact that he had operated three set nets on these grounds from ten days to two weeks, and had not caught a single fish.

It was not from this witness that these findings were based, yet they are the only witnesses who gave evidence, or were interrogated, on this subject.

XI.

FINDING NO. III.

“The defendants and cross-complainants, up to the time of the interlocutory decree herein, had by the restraining order issued in this case and had by the act of the plaintiff, been deprived of their fishing locations and of the use of their set nets therein during the entire time of four fishing seasons, viz.: the fishing seasons of the years 1908, 1909, 1910 and 1911.”

This finding is simply in line with findings No. I and II—in fact, is no finding of any fact in issue.

XII.

FINDING NO. IV.

“During the entire time of the four fishing seasons mentioned in finding of fact number three (3), the plaintiff occupied the defendants’ fishing locations and operated drag seines thereon for the purpose of catching salmon and did catch large amounts of salmon each season, the amount of catch being as follows:

In the year 1908, 150 tons.

In the year 1909, 104 tons.

In the year 1910, 135 tons.

In the year 1911, 390 tons.

Total for four years, 779 tons.”

This finding is erroneous and misleading.

As a matter of fact, appellant did not occupy appellees’ alleged fishing locations, or any part of either. As a matter of fact, appellant did not fish

appellees' alleged locations, and there is absolutely no evidence to the effect that appellant did. The undisputed evidence shows that appellant did not. Furthermore, the catch of salmon made by appellant covered a territory many thousand times greater than that occupied by appellees' set nets. All that appellant did was:

(a) Engaged in the business of drawing seines in the waters of said river in front of Sites 2 and 3, Sand Island, and landing same upon the shore of the island.

Appellant neither occupied nor fished appellees' alleged locations.

It is true that possibly many times appellant floated and drew seines over these alleged locations, but as to occupying or fishing either, it did not. Appellees had the same right to fish such grounds as appellant, and could have fished them the same way. The injunction was not intended to and did not prevent appellees from fishing said waters. All that appellant asked or obtained was an injunction during the term of its lease, and then only against maintaining fixed structures in the bed of the navigable waters fronting said sites.

Although if it be substantially true that appellant did catch the number of fish found by this finding, we submit it is wholly immaterial and furnishes an erroneous basis for determining appellees measure of damages.

We believe this is easily demonstrated. Every witness that appellant called in this case, who gave

his opinion as to the number of fish that he thought could have been caught in appellees' set nets, if fished, was forced to admit that the only set nets that had ever been operated in front of these sites, or in that vicinity, were three in number, and were those operated by appellees. And if the testimony of appellees is to be credited at all, these three nets were operated from the first part of May to June 21, 1908, and they did not catch a single fish. Mr. McGowan thinks some fish were caught and stolen. This is the wildest conjecture. No fish was taken by any one, none were seen in the nets. Beyond this, these grounds were never fished with a set net, or any appliance, excepting, of course, drift nets and seines were at times hauled thereover. But in all the history of the fishing industry, no set net had ever been operated there, or in that neighborhood, unless you consider the one operated by witness Markham in the Oklahoma channel, and he caught five fish—not enough to pay expenses—and some little play fishing related by witness Grable.

Therefore, there was absolutely no standard upon which any one could base an opinion other than fish could not be taken there by such appliances. No human being had ever caught any fish by any such process there. In fact, set net fishing had never been employed in the lower Columbia River. Now, upon what fact could any one base an opinion upon which he could give legal evidence? The witnesses were without experience in that line. This method had never been tried by any person.

The whole proposition, to express it mildly, was an experiment pure and simple. This case has no parallel with the case of *Pacific Steam Whaling Co. v. Alaska Packers Association*, 72 Pac. 161-5.

In that case, the identical appliances had been in long use on the identical grounds, so that the reasonable return of each fish boat was a matter that could be and was in that case accurately estimated. No such state of facts exist here. The appliances sought to be used here had never been used before, except with a total failure.

Furthermore, seines and set nets are operated upon entirely different principles, and are dissimilar in every respect. The seines cover square acres where the set nets cover square feet. But the entire recklessness of this finding, and the total disregard of the lower court of appellant's rights is shown by this finding, for appellees only claim set nets in front of Sites 2 and 3. Now, the evidence shows that appellant's lease upon which it bases this right expired March 28, 1911. The evidence also shows that prior to April 1, 1911, advertisement was again made to lease all the sites on Sand Island, and that appellant secured a lease for Sites 1, 2 and 3 thereon, beginning April 1, 1911, and fished them all in August, 1911, catching 390 tons of fish. The court gave appellees one-third of these fish. If appellant had by chance been lessor of the whole island, and been fortunate enough to have caught 1200 tons of fish, doubtless appellees would have been given one-third of all these fish. But, be

that as it may, there is absolutely no evidence that the fish caught by appellant were caught on territory occupied by appellees' alleged set net locations.

XIII.

FINDING NO. V.

“The set nets which the defendants would have operated upon said fishing locations had they not been prevented by plaintiff from occupying the locations would have caught two-thirds as many fish and two-thirds as much in quantity each year as were caught by the plaintiff's drag seines. that is to say, two-thirds of 779 tons, the amount shown by finding of fact number four (4) as actually caught by the drag seines, making 518 tons which defendants' set nets would have caught during the four fishing seasons.”

LAWS OF OREGON AS TO SET NETS ON THE COLUMBIA RIVER.

Nothing could be more erroneous and absurd than findings No. IV and V, when considered in the light of the laws of Oregon existing during the period in question.

It must be remembered that the Supreme Court of the United States announced its decision in the suit brought by the State of Washington against the State of Oregon, wherein it was determined that the boundary line between these states was north of Sand Island, on the 16th day of November, 1908.

It was then known to the world that Sand Is-

land was in Oregon, and that Washington had no jurisdiction thereover.

Now, under the laws of Oregon, existing during the years 1908, 1909, 1910 and 1911, there were no restrictions whatever as to distances between set nets in Oregon pertaining to the Columbia River, or set net locations. Under the law then existing on the Columbia River, a set net could be placed any distance one desired from another. Therefore, the appellees had but eight licenses. The sites 2 and 3 had a frontage of 7,000 feet (see Plaintiff's Exhibit "E", page 724, Transcript of Record). Every foot of this territory could have been during that whole period legally occupied with set nets. The set net locations of appellees, if legal at all, occupied only the actual ground upon which they were constructed. There was no end or lateral passageway provided by law in Oregon as to set nets in such river. To hold under such circumstances that appellees were entitled to all fish caught in the vast space in front of such sites is simply absurd. Furthermore, to hold that the measure of appellees' damages for being deprived of their right to maintain eight set nets there was two-thirds of the number of fish taken by appellant, whose seines swept the whole of that territory clear into the deep navigable channel of the river is nothing more or less than judicial robbery. It can find support neither in law, equity or fact.

XIV.

FINDINGS NO. VI and VII.**VI.**

“I find that by reason of the foregoing facts the defendants were in the position of forced lessors of the locations in question, inasmuch as they owned them and were entitled to them, but the plaintiff, through its own act and through the aid of the restraining order heretofore mentioned, occupied and fished them and appropriated the entire output to its own use, and defendants were therefore in position of lessors furnishing the location without furnishing fishing gear, and they were therefore entitled to one-third of the gross catch of what their set nets would have caught upon said locations, that is to say, one-third of 518 tons, being 172 tons.”

XV.

FINDING NO. VII.

“As set forth in finding of fact No. 6, the amount of fish to which defendants were entitled as the rent for the four seasons was in the aggregate, 172 tons, and I find that the average price of fish for the four seasons was \$130.00 per ton, and the 172 tons of fish were of the value of \$22,360.00.”

These findings, excepting as to the value of the fish caught, are on the same theory as the previous findings, which we have heretofore discussed.

XVI.

AVERAGE PRICE OF FISH.

The master found that the average price of fish

during the four seasons was \$130.00 per ton. This finding was modified by the court below in this: The lower court found that the average price for fish for 1908 was \$120.00 per ton; for 1909, \$125.00 per ton; and for 1910 and 1911, \$130.00 per ton, from which the learned lower court found that the value of the 172 tons of fish, which according to the alleged custom appellees were entitled to receive as rental for their alleged set net locations, was \$22,083.00. Just how the learned court arrived at these figures, we are unable to comprehend, unless an error was made in calculation. According to findings of fact No. IV and V, the basis of appellees' damages was the amount of fish caught by appellant during the years 1908, 1909, 1910 and 1911, as follows:

1908—150 tons

1909—104 tons

1910—130 tons

1911—390 tons

— — —

Total 779 tons

Taking the above as a basis, the court found that appellees' set nets, if operated during said year, would have caught each year two-thirds of the total caught by appellant, namely:

1908—100 tons

1909—69.33 tons

1910—90 tons

1911—260 tons, which the court found to be a total of 518 tons.

The lower court further found that the meas-

ure of appellees' damages was the value of one-third of such estimated catch, namely:

1908, estimated catch 100 tons, 1-3 amount	
33.33 tons valued at \$120.00 amount \$	4000.00
1909, estimated catch 69.33 tons, 1-3	
amount 23.1 tons valued at \$125.00	
amount	2887.50
1910, estimated catch 90 tons 1-3 amount	
30 tons valued at \$130.00 amount	3900.00
1911, estimated catch 260 tons 1-3 amount	
86.66 tons valued at \$130.00 amount	11266.60

Total amount	\$22,054.10

We have given appellees by these figures almost a ton more fish than the court found as rental, yet the amount is \$28.90 less than the judgment entered against appellant. We cannot reconcile the judgment with the findings, nor the findings with the judgment.

XVII.

FINDING NO. VII.

“The defendants and cross-complainants were equally interested in the said fishing locations.”

This is a remarkable finding—remarkable in that we find no evidence to support it in the record, and, if true, remarkable in that each appellee was clearly violating the laws of Washington.

Sec. 5187, Remington & Ballinger's Annotated Codes and Statutes of Washington, Session Laws of 1907, pg. 681, provides as follows:

“No more than three licenses shall be issued to any one person, firm or corporation.”

If this finding is true, then H. S. McGowan, a canneryman, not only owns two set net licenses issued to him by Washington, but is equally interested with J. P. Coyle in three more, and with Erick Lindstrom with three more, making the modest total of eight fishing licenses and fishing locations in which he owns an undivided interest. Both Lindstrom and Coyle owned the same number. This is the character of ownership the legislature of Washington desired to prohibit. Here are violators of the law, each urging a cause of action for damages for being prevented from violating the laws of both Washington and Oregon. Strange to say, they discovered a forum which granted them damages therefor. We know of no legal principle which admits of any one to enforce a claim for damages based upon acts prohibited by law. If such is the law, then a burglar undoubtedly has an action against the owner for preventing him from burglarizing the owner's house. His measure of damages would be the value of the lot he would have obtained had he not been interfered with.

XVIII.

CONCLUSIONS OF LAW.

The conclusions of law are based upon these findings.

We have discussed the findings, and what we have said in regard thereto applies equally to the conclusions of law and need not be repeated.

XIX.

THE APPELLANT FILED A MOTION REQUESTING THIS COURT TO DISMISS THIS SUIT ON JUNE 4, 1909. THEREFORE, APPELLEES CANNOT UPON ANY THEORY CLAIM DAMAGES OCCURRING AFTER THAT DATE.

This suit was brought in the court below under the mistaken belief that Sand Island was within the territorial boundaries of Washington.

Shortly after the decree of the Supreme Court of the United States, in *Washington v. Oregon*, was handed down, and on June 4, 1909, appellant filed a motion in the court below, praying the court to dismiss this case. Pages 126-7-8-9, Transcript of Record. This motion was based upon the ground that the court had no jurisdiction of the cause of action, a proposition which we have heretofore discussed. The appellees denied this motion. It was submitted to His Honor Judge Donworth, and was by him overruled. The appellant has been forced by appellees to maintain this suit, as well as the preliminary injunction. It had been appellant's contention ever since the decision was handed down in the boundary suit between Washington and Oregon, that the court below had no jurisdiction of this suit, and had been trying its very best to quit. But appellees forced it to keep the suit; have forced appellant to maintain its injunction; and now contend that they are entitled to damages during the years that appellant had been forcibly held in the court below .

To make this matter clearer, appellant, on September 5, 1910, filed in the court below its supplemental complaint (pg. 149, Transcript), in which it alleged that the court below was without jurisdiction and prayed for a dismissal of this suit, but appellees filed an answer insisting upon the court below retaining jurisdiction, with the result that this suit was retained.

The only theory upon which appellees resisted appellant's efforts to have this case dismissed, was that they had filed their cross bills; otherwise, our motion to dismiss would have been sustained.

Therefore, the only purpose for which this case was retained in the court below was upon appellees' cross bills, and then only as to damages to date of filing same. They cannot recover on these cross bills any damages sustained after filing same. This is fundamental law. Had appellees permitted a dismissal of this suit when appellant filed its motion therefor, then damages would have ceased. Upon what theory can it be held that appellees are entitled to the enormous damages under this state of facts?

XX.

APPELLEES HAD NEITHER LOCATION NOR LICENSE.

In this connection, we again repeat, that the only theory upon which the appellees kept the appellant in court and prevented it from dismissing this suit was upon the counterclaim which they separately filed. It is by virtue of the facts set forth in this

counterclaim that the court held, as we understood it, that appellant could not dismiss this suit.

An investigation of these cross bills will show that neither of the appellees ever had a set net location in front of either of said two sites in question. Each of the appellees plead that he is entitled to operate his set nets in front of these premiss by virtue of a license issued to him by the **Fish Commissioner of the State of Washington**, and that by virtue of such set net licenses, he selected and marked out the locations which he claims in this suit.

The appellees plant their entire defense and their sole claim to these locations upon the licenses issued to them by the Fish Commissioner of the State of Washington.

There is absolutely no contention found anywhere in the record that either of the locations in question were taken under any Oregon license, or that the laws of Oregon pertaining to set net locations were ever attempted to be complied with.

We have here a case where the appellees, citizens of the State of Washington, have come into the State of Oregon, armed with a license issued by the officials of the State of Washington to operate and maintain set nets within the territorial boundaries of the State of Washington, and with these licenses, set net locations were attempted within the territorial boundaries of the State of Oregon according to the laws of the State of Washington, and in violation of the laws of the State of Oregon. Every day that the appellees were operating these set net lo-

cations, they were violating the criminal laws of the State of Oregon, Secs., 5294-5298a-5321, Lord's Oregon Laws. Under the laws of the State of Oregon, the appellees were not permitted to operate these set nets, and could have been prosecuted and punished for every day they were operated, and the set nets could have been confiscated.

Section 5304, Lord's Oregon Laws, reads as follows:

"Any person having obtained a license from the fish warden to operate a set net shall cause to be placed and maintained on a substantial post or monument erected for that purpose on the bank of the river or channel, or on a buoy securely anchored on the location claimed, the number preceded by an "O" designated by the fish warden at the time of issuing such license, said number to consist of black figures not less than six inches in length painted on white ground. In addition thereto said person shall cause to be branded on the corks of each end of said set net and upon the cork nearest the center thereof the number designated in said license, said number to consist of figures not less than one inch in length."

In the face of the foregoing statutory provision, how can it be successfully contended that either of the appellees ever had any set net location whatever, or had any right to operate set nets in front of such sites? Not having a license to operate set nets, they gained no legal status in attempting to make loca-

tions. Having no legal or equitable rights, they were deprived of none by the injunction.

Appellees cannot escape the above conclusion by claiming that H. S. McGowan subsequently acquired licenses from the fish warden of Oregon for the all-sufficient reason no location was attempted thereunder.

On page 259, Mr. McGowan testifies that there were issued to him 2 set net licenses, 3 to Coyle and 3 to Lindstrom, all dated April 15, 1908. These licenses he produced and said—

“We all located these set net licenses on the fishing grounds on the 16th day of June, 1908 and were located by anchoring buoys at each end of the ground covered by each license and fastening the license number to the buoys. The buoys were held in place by means of stone anchors, that is they were stones with holes drilled in; stones probably weighing 300 pounds, and through the holes in the stones wire cables were put and clamped on; wire cable probably 20 or 25 feet long, or 30, and on the other end of the wire cable were fastened suitable cedar buoys, probably four feet long, and about eight or ten inches in diameter, and on these buoys were fastened the license numbers. These license numbers were in black figures on light background; the figures were about seven inches long. There were two buoys to each location and these buoys were located, of course, at the place we intended to occupy for our set nets. All of these buoys were handled in the same manner, and the licenses for each of said sites

were attached as I have heretofore indicated. We were working together to a large extent. I know that this was the customary method of anchoring set nets and it was the only practical method, and I was intending in good faith to occupy these locations with set nets and I obtained these licenses for that purpose. The reason I did not obtain licenses from the State of Oregon was that the property was within the State of Washington and the rights were in the State of Washington so far as I know. That was the general understanding. Everybody acted upon that assumption, both private individuals and public officials. I did, however, obtain four licenses from the State of Oregon, and I have these with me. They are numbered O-142, O-143, O-144, O-145. I got them simply so that there would not be any question as to our right in the State of Washington or the State of Oregon in operating my fishing rights on Sand Island. I knew that there was a controversy existing between these two states over the boundary line and I obtained these licenses accordingly as a protection so that I would have licenses from whichever state that should prevail. These licenses were issued to me on the dates they purport to bear, and I have never transferred them. I had these Oregon licenses merely to protect my rights in fishing there the best I knew how. After the defendants Lindstrom and Coyle and myself had anchored the buoys, I have just mentioned, I received a call from Mr. Bagnall, Assistant United States Engineer of the Columbia River District, and he informed me that

he was investigating a complaint that had been made against me for obstructing navigation.

All of our set net locations were below and beyond low tide, probably 50 to a 100 feet below the line of low-water mark, extending out into the stream and none were above the line of low tide. We also had a drag seine license for that location that year. It was issued April 1, 1908, and this license was posted on the premises on a board with black letters or figures on a white or light ground, nailed upon a post at each end of the location. The number of that license was 726, issued by the Fish Commissioner of the State of Washington. I had this license at the same place I had posted our former seining licenses on the same premises. There was a post driven in the ground standing up probably five or six feet above the surface. The license numbers were painted on a board or boards in black letters about ten inches long, on a white or light colored ground, and these boards containing the license numbers were then nailed upon this stake in a conspicuous manner. This license number, 726, was placed there immediately after the license was received. It was not issued until the first of April and probably was not received from the Fish Commissioner for a day or two afterward. It was posted, however, during the month of April, 1908. I took a photograph of that monument which marked my drag seine license. I cannot give the exact date it was taken, but it was subsequent to April 1, 1908. I took the picture myself. There are a number of boards nailed

to the same post other than the one that carries the number of this 1908 license.

These are the licenses of the previous years. The license number did not show very plainly. The weather had beaten the lettering off so that it was indistinct unless you get close up, but the number 726 appears prominently.

MR. DOOR: The license that the witness is testifying about, which is 726, bears the date of April 1, 1908, and is purported to be a license for one year, ending as it is printed in this blank, March 31, 1908. This would be the day before the date that it was issued, which counsel contends at this time is manifestly an error of the expiration date by the issuing office. We may have to ask some indulgence to prove that if any objection is made against it.

MR. FULTON: I will stipulate that this was a mistake in the date; that the date should end on March 31, 1909."

Again on page 287, Mr. McGowan testifies as follows:

"The Oregon licenses were not used because of the general understanding that the territory was within Washington."

Again on pages 288 and 289, this same witness testifies that he had no Oregon licenses for either the year 1909, 1910 or 1911.

XXI.

THE EVIDENCE.

In our judgment, there is no evidence of ac-

tual damages suffered by appellees in this record. On the contrary, the evidence overwhelmingly shows:

FIRST: That appellee H. S. McGowan induced the other appellees to act in concert with him in placing these obstructions under the name of set nets in front of said sites, for the sole purpose of harassing any annoying appellant and preventing it from employing its premises in landing seines thereon, and without any intention whatever of operating any set net on any point thereon.

SECOND: That the said alleged locations were valueless for set net purposes.

THIRD: That it was a physical impossibility to either maintain a set net on either of said alleged locations, or to catch any fish, if operated, for three reasons.

(1) That the grounds were wholly unsuited for the operation of set nets.

(2) That the current was too swift and strong to possibly maintain a set net there, and

(3) That each of said locations were squarely on the main drifting grounds used and employed by gill net fishermen and would have been destroyed by them.

Conceding for the sake of the propositions under consideration that appellees had the right to deprive appellant of its frontage, and its ingress to and egress from its premises, and that appellant by injunction deprived appellees of the use thereof, the appellees can recover only such actual damages, if

any they actually sustained, and which the evidence shows they sustained, if any.

If the evidence fails to show actual damages, then nominal damages are alone recoverable.

The only evidence which appellees offered as to their damages, was the opinion of themselves and two other witnesses, namely, Amon Markham and Ralph Grable, that had these set nets been operated many tons of fish might have been caught therein. We have had occasion to remark that neither of these witnesses had ever tried these grounds, or operated a set net in such waters, the evidence showing that such methods had never been employed by fishermen on the lower Columbia River. (See Evidence, H. S. McGowan, pg. 303, Transcript). No other witness on behalf of appellees gave any evidence on this question.

Moses Hirschey, a witness on appellees' behalf, an expert fisherman, was asked by council for appellees (pg. 540, transcript) what he thought about these locations for set net purposes. But he declined to express an opinion, because he had never tried it, and knew nothing about set nets.

Against the opinionated evidence of the appellees and these two witnesses, appellant called an array of disinterested fishermen, men engaged in and who had been engaged in operating set nets for catching salmon fish for many years on the Columbia River namely:

C. Hansen, Jr., Jens Neilson, Capt. John Oster-vold, M. Lugnet, Ole J. Settem, R. A. Hawkins, W.

A. Latourell, H. R. Reed, E. Polson, H. M. Lorentsen, T. K. Johnson and T. M. Nelson.

These witnesses were wholly disinterested. None were in the employ of appellant, excepting only R. A. Hawkins, and each was, and for many years had been, familiar with set nets, and their operation, character of water and places where they could be practically employed, and each stated that set nets could not be operated on these locations, and such locations were valueless for set net locations.

Yet, the court below disregarded the sworn testimony of all these witnesses, and found in favor of two witnesses, who had no experience, and more than that, adopted an erroneous rule for the measure of appellees' damages.

XXII.

APPELLEES' PURPOSE.

We have ever contended that it never was the intention of appellees to operate any set net on these alleged locations. That these obstructions, under the guise of set net locations, were placed in front of said sites for the sole purpose of injuring, harassing and annoying appellant.

The evidence shows that appellee McGowan is the only interested one. The other two appellees are his employes, they have never been called upon to advance either labor or money, and neither knows anything about what costs McGowan has been put to.

The evidence shows, that Mr. McGowan fish-

ed one of these sites before the government leased same, and after the government concluded to lease same, McGowan was the successful bidder for the three years beginning in 1905. He operated no set nets there; on the contrary, he operated seines, and no one interrupted him, but in 1908, bids were again called for, and appellant was the successful bidder. McGowan was angry because of this, and he seemed obsessed with the idea that he was the owner of this site, and immediately adopted these means in retaliation of his misconceived grievances.

The evidence of McGowan and the other appellees shows that these obstructions placed in front of these sites, under the cunning guise of set net locations, were placed there for the sole purpose of prohibiting appellant from operating seines and not to catch fish.

This brief is already too long, but before closing we cannot refrain from calling the court's attention to the unreasonableness, if not utter falsity, in the testimony of the appellant and their two witnesses.

As we have stated, the evidence shows that the appellee McGowan had operated these identical sites for many years prior to 1908 and he had during that time employed the same exclusively in operating seines.

It is not contended in this case that the appellant here was at all extravagant in conducting its seining operations on these grounds.

We call the court's attention to page 210, Tran-

script of Evidence, from which it appears that it cost the appellant at least \$15,000.00 to put its seining outfit alone on these grounds, and it had expended that sum of money by the 2nd day of July, 1903, when it began its seining operations. It had 6 seining boats, 2 launches, scows, cooking utensils, barns for its horses, and it had 24 horses and employed 48 men. It is not difficult to estimate the cost of operating these seines on these grounds.

It is fair to assume that Mr. McGowan had a crew of equal size, and was required to expend equally as much money whilst he operated the same ground. Now, turn to the testimony of Mr. McGowan. He testifies that in his opinion had he been permitted to operate these 8 set nets on these grounds, he could have caught practically as many fish as the seines. His estimate was that he would have caught at least two-thirds as many, and he stated the total expense per year to have been only \$2,000.00. But Mr. McGowan's estimate of the number of fish that he could have caught in these eight set net locations was 150 tons of salmon fish each year, without paying one cent rental, and valued at \$120.00 per ton equals \$18,000.00, less the expense of operation \$2,000.00, leaving him a clear profit of \$16,000.00, but when fish were selling at \$130.00 per ton, a profit of \$17,500.00. This is McGowan's sworn statement. Now, mark the bid he made for a lease for these sites, when the procurement of such lease would have given him not only these set net locations, but the shore also. His bid was to use his

own language (pg. 294, Transcript), "I do not recollect, but it might have been in the neighborhood of \$1,000.00." In the face of this testimony, can this court place any reliance upon this estimated catch, so much relied upon by the appellees.

Furthermore, is it conceivable that any sane person would go to the enormous expense of purchasing and operating seines, employing a large number of men, the initial expense being little short of \$15,000.00, and the daily expense running into the hundred of dollars, when he could have caught the same fish at an initial expenditure of not to exceed \$650.00, and a total expenditure for operating expenses of \$2,100.00, and a grand total of not to exceed \$3,000.00? Can the bid made by Mr. McGowan be reconciled upon any principle of common honesty, with his opinion and evidence of the catch of fish by these alleged set net locations?

XXIII.

CONCLUSION.

In conclusion, we respectfully submit—

FIRST: That the court had no jurisdiction over the cause of action set forth in the complaint, and surely no jurisdiction over the matters, or cause of action set forth in the separate answers and cross bills of the appellees.

SECOND: That the question of concurrent jurisdiction is not, and cannot be involved in this suit, for the reason that Oregon and Washington have not passed concurring laws in regard to set nets.

THIRD: That under the laws of Oregon, as determined by its Supreme Court, *Eagle Cliff Fishing Co. v. McGowan, et al., supra.*, the appellant, as lessee of the United States of Sites 2 and 3 and appurtenances thereto, was entitled of right to have its entire frontage between its shore and the navigable waters, clear and free of all obstructions, so that it could, without interference of any fixed structure haul its seines upon its shore and land them therefrom, and that under the provisions of the Constitution of Oregon, as construed by the courts of such state, the placing and maintaining of the set nets complained of here was unlawful, in that it in effect vested in appellees a private fishery.

FOURTH: The pleadings and also the evidence show that neither of the appellees had a set net location. They could not obtain a set net location in Oregon, unless they first complied with the laws of Oregon, which they did not do, and their defense is based entirely and exclusively upon licenses issued by the State of Washington and locations made thereunder.

FIFTH: In any event, the appellees can recover no damages beyond the first year, namely, during the year 1908, because of the fact that before the beginning of the fishing season of 1909, appellant filed a motion to dismiss this case, on the ground that this court had no jurisdiction. The appellees resisted this motion, and, at their request, the court below retained jurisdiction.

SIXTH: Under the evidence in this case un-

der any construction, the appellees can only recover nominal damages. There is absolutely no competent evidence on the part of appellees of the value of the use of either of these alleged set net locations, and the attempt to prove value by an alleged custom wholly failed, for the reason that there is no evidence of such alleged or any custom.

Respectfully submitted,

G. C. FULTON,

Solicitor for Appellant.

ADDENDA.

The following is a copy of the Act of the Legislative Assembly of the state of Oregon, granting to the United States all tide lands bordering upon and adjacent to Sand Island.

A N A C T

To grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.

**BE IT ENACTED BY THE LEGISLATIVE
ASSEMBLY OF THE STATE OF OREGON:**

Sec. 1. There is hereby granted to the United States, all right and interest of the State of Oregon in and to the land in front of Fort Stevens, and Point Adams, situated in this state, and subject to overflow between high and low tide, and also to Sand Island situate at the mouth of the Columbia river in this state; the said Island being subject to overflow between high and low tide.

Sec. 2. The Governor of this state shall cause two copies of this act to be prepared and certified under the seal of this state, and forward one of such

copies to the Secretary of War of the United States, and the other of such copies to the commanding officer of this district of the military department of the Pacific Coast.

Passed the House Oct. 19th, 1864.

I. R. MOORES,

Speaker of the House of Representatives.

Passed the Senate October 20th, 1864.

J. H. MITCHELL,

President of the Senate.

Approved October 21st A. D. 1864.

ADDISON C. GIBBS,

Governor of Oregon.

Endorsed: H. B. No. 65.

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION
(a corporation),

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P.
COYLE,

Appellees.

MOTION FOR ISSUANCE OF A NEW CITATION
AND APPELLANT'S REPLY BRIEF.

Appeal from the United States District Court for
the Western District of Washington.
Southern Division.

Hon. GEORGE DONWORTH, Judge.
Hon. EDWARD E. CUSHMAN, Judge

G. O. FULTON, Astoria, Oregon, Solicitor for Appellant.

DORR & HADLEY, Seattle, Wash.

WELSH & WELSH, South Bend, Wash. } Solicitors for Appellees.

FILED

SEP 10 1914

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION
(a corporation),

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J. P.
COYLE,

Appellees.

Comes now the above named appellant, by its solicitor, G. C. Fulton, and hereby moves the Court for an order directing the issuance of a new citation herein directed to the United States Fidelity and Guaranty Company, the surety on the injunction bond of appellant and against whom a judgment was entered in the Court below, as such surety.

In support of this motion, appellant avers that as it and its solicitor was advised at the taking of the appeal herein, said, The United States Fidelity and Guaranty Company, was not a proper party to this appeal and it was not proper to serve it with citation. That this appeal was taken and is prosecuted in good faith and with the sole intent to have this cause fairly submitted to this Court.

G. C. FULTON
Solicitor for Appellant

The Appellant will submit the above motion to the above entitled Court at the coming in of said Court Monday, September 14th, 1914, or as soon thereafter as same can be heard.

Argument on Motion of Appellees to
Dismiss the Appeal and Cross Motion
of Appellant for a New Citation.

Counsel for appellees have submitted a motion to dismiss the appeal upon the sole ground that the United States Fidelity and Guaranty Company, the surety on appellant's injunction bond, and against whom the Court below entered a judgment in the sum of Twelve Thousand Dollars (\$12,000), was not served with citation, nor its interest severed. No direct authority is submitted in support of this contention, we therefore assume they were unable to find any.

A recent case, involving this very question of practice, was before the United States Circuit Court of Appeals for the Fourth Circuit, **Gilbert vs. Hopkins, et al**, 198 Federal 849-51. In that case the plaintiff filed a bond with surety for costs in the lower Court. Judgment was entered in favor of defendant, and against plaintiff and his surety for costs on the surety bond. The plaintiff appealed but failed to make his surety a party to the appeal. The defendant filed a motion in the Appellate Court to dismiss the appeal, assigned among other reasons,

“that the Surety Company on the bond of the plaintiffs in error, for costs in the court below, is not joined as plaintiff in error.” The Court did not consider this motion of sufficient importance for any comment. The motion was denied as being without merit.

No advantage can be obtained to appellees by making the Surety Company a party to this Appeal, for the reason it is appellant's surety on its supersedeas bond, and appellees were satisfied with such surety at the time the appeal was perfected. Therefore, nothing can be gained to appellees by making such surety a party to this Appeal.

Johnson vs. Trust Co. 43 C. C. A. 458.

While we are clearly of the opinion that appellees' motion is without merit, as a matter of precaution, and to fully protect appellant's right, we have submitted a motion requesting this Court to issue a new citation, bringing in the United States Fidelity and Guaranty Company a party to this Appeal. The power and jurisdiction to issue such new citations, as well as the duty so to do, has been so frequently discussed and firmly established as to require no argument whatever.

Martin vs. Buford, et al, 176 Federal 554

Teal vs. Chesapeake Bay Co., 204 Federal 914.

Browning vs. Boswell, 209 Federal 788-91

Dodge vs. Knowles, 114 U. S. 430

In re Chitwood, 165 U. S. 443

Thomas vs. Green Co. 146 Fed. 969-10.

And the fact that the time has expired for suing out the writ, does not deprive this Court of such right.

Gilbert vs. Hopkins, 117 C. C. A. 491 (198 Fed. 849)

Teal vs. Chesapeake & O. Ry. Co., 204 Fed. 917

Nome and Sinook Co. vs. Amer. Mercantile Co. 187 Fed. 929.

It is unnecessary to say that this appeal is taken in good faith, the large costs thereof, the labor necessary to perfect the same, are facts conclusive of our honesty, sincerity and good faith. We had before us when we perfected this appeal the case of Gilbert vs. Hopkins, supra holding that the surety was not a proper party to this appeal. We relied upon the ruling in that case. If this Court should conclude that we were in error, and that it is a matter of discretion in this Court as to whether a new citation should issue, we submit that our misapprehension in this regard is sufficient grounds for allowance of such new citation. This was held sufficient grounds in Browning vs. Boswell, 209 Federal 788-791.

APPELLANT'S REPLY BRIEF. JURISDICTION.

On page 31 of appellees' brief, we find the following statement: "Having effectively used the process and machinery of this Court for four years to keep appellees out of their fishing grounds and to appropriate unto itself their fish and the profits therefrom, appellant now insists that the Court is without jurisdiction in the premises, and that its motion to dismiss the suit should have been granted, notwithstanding the cross bills and demands on behalf of the defendants."

And on page 51 of their brief is the following statement: "For a stronger reason, the plaintiff cannot himself raise the objection when the suit takes such a turn that it becomes desirable for him to get out. This rule has been applied in the case of a cross bill."

Evidently, the above is an attempt to have the Court believe that the motion of appellant to dismiss this case was not urged until after four years had expired and after the appellant had effectively used the process of this Court during that time, and that appellant employed the machinery of the Court until it discovered a turn in the case not to its liking and then suggested this motion. Nothing could be further from the facts. Before any testimony was taken, and immediately upon the publication

of the opinion of the case of the State of Washington v. State of Oregon, the appellant filed its motion to dismiss this case, upon the ground that the Court below did not have jurisdiction, for the reason that the premises in controversy were within the boundaries of the State of Oregon. The appellees successfully resisted this motion. In the light of the record here it ill becomes appellees to urge before this Court that the appellant effectively used the process and machinery of the lower Court until its purpose was subserved and then suggested the motion to dismiss. The record is against any such contention.

The suggestion is made that we do not appreciate the distinction between venue and jurisdiction. We confess we do not, if our motion to dismiss this case upon the ground that the premises were in Oregon raises a question of venue only, and not jurisdiction. Our contention is, and always has been, that this motion presented a question of jurisdiction. It is frankly admitted by counsel for appellees that the State of Washington had ever taken and assumed the exclusive jurisdiction over Sand Island prior to the boundary line decision, and appellees also concede that the officials of Washington would not permit fishing apparatus to be employed thereon unless licensed by the State of Washington, and because appellant accepted the contention of Washington officials and brought this suit in the lower Court

and alleged the premises in controversy to have been within the territorial boundaries of the State of Washington, it is accused of bad faith because after the Supreme Court of the United States held that the state's contention was wrong, it asked for a dismissal of the case for lack of jurisdiction. We had presumed it never would be contended that a district court in Washington had jurisdiction to determine the title to real estate in Oregon, or to issue injunctions or restraining orders pertaining to land titles in Oregon. The situation in which appellant has found itself is very easily explained and very easily understood. It could have obtained no relief in Oregon, had it instituted this suit there. The Washington officials would have paid no attention to any order or decree of a Court in Oregon. As soon as appellant discovered that Sand Island was in Oregon, it seasonably and in good faith suggested this to the Court below. That Court held that it had nevertheless jurisdiction of this case, and that it had the power to determine title to real estate in Oregon. We cannot agree to the doctrine that a mistake in an allegation of a fact in a complaint when shown to have been a mistake could give a Court in Washington jurisdiction to determine the title to real estate in Oregon. The Court below was powerless to enforce its decree, for the simple reason it had no jurisdiction. There are many instances where a mistaken allegation of a fact may give the Court power to take cognizance of the suit where only a question of venue is at issue,

but this cannot be true as to jurisdiction of the Court. A Court has jurisdiction as a matter of law, and parties cannot stipulate jurisdiction in any Court, that as a matter of law it does not have.

EXCLUSIVE FISHERY.

We regret that we are compelled to call the Court's attention to a clearly erroneous statement in appellees' brief.

On page 62 of appellees' brief is the following statement: "Realizing the untenability of the claim in the lower Court that its shore-ownership gives appellant an exclusive right of fishery in the river, counsel tries to drop that broad contention in his appeal brief and now avers that he never did make it; yet with the same breath reiterates it time and again."

That portion of our brief printed on pages 45, 46, 47, 48 and 49 is practically copied from our brief filed in the Court below. In the Court below, we did not contend that the shore owner had the exclusive right of fishery, or had any right of fishery superior to any person. Counsel for appellees always contended that the effect of our complaint was to make such claim, but they never boldly contended before that counsel for the appellant ever made such contention. We submit there is no such contention in the complaint. No relief is asked which

could give the appellant any exclusive right of fishery. All that the appellant seeks by this suit is to enjoin the appellees from constructing, operating and maintaining fixed structures in front of its shore line. It made no difference to appellant the use of these fixed structures, or to what use the appellees intend to apply same. The appellees answered that they desired to employ these fixed structures for fishing operations. Appellant's answer to that was, that it did not make any difference for what purpose it was proposed to use these structures, and that is still our contention. If appellees had the right to place fixed and permanent structures in front of appellees' land, it would surely make no difference to appellant the purpose for which such structures were proposed to be used or employed. Therefore, the question of fish and fishery rights are mere incidents to this suit. One of the reasons why appellant contended that the fixed structures should be removed was that it desired to employ its premises in launching seines therefrom and landing the same on its shore.

Counsel for appellees concede the law to be that it has such right as an incident shore ownership. In this wise, the question of fish and fishery rights has arisen in this case.

EAGLE CLIFF CASE.

Counsel for appellees make the following astonishing statement, page 65 appellees' brief:

“As we read the record in that case (referring to the Eagle Cliff case), the point at issue must have been whether the set-nets there in controversy were constructed according to law; not, as here, whether they were constructed at all.”

With due respect to counsel for appellees, we wish to say that no such contention was made by either party to that suit, and nothing in the record can be found that will justify any such contention. The contention there was exactly the contention here, namely, was the owner of a license to operate a set net permitted to locate, operate and maintain a set net thereunder in front of the shore lands of another without the riparian owner's consent at any point between the line of low water and the line of navigability? That was the only question presented and passed upon in the Eagle Cliff case, and it was held in that case that a set net could be so constructed, operated or maintained, and that the shore owner or riparian owner was entitled to an injunction enjoining and restraining the construction, operation and maintenance of any such structure. That was all there was to the Eagle Cliff case. The identical question involved in this case was squarely and fairly presented to the Supreme Court of the State of Oregon in the Eagle Cliff case, and there was no other proposition involved other than the contention was made that the interlocutory decree

entered in this case was res adjudicata of the Eagle Cliff case.

At the hearing of this case, with the permission of the Court, we will submit an abstract of record of the Eagle Cliff case, together with the briefs of the respective attorneys on each side. The Eagle Cliff case, as we understand the law, is absolutely decisive of this case.

We do not understand that the question presented here has ever been passed upon by the Supreme Court of the State of Washington; but it matters whether it has or has not. The Supreme Court of the State of Oregon has passed upon this question, and we have a right to invoke the doctrine and rule announced by that Court as decisive of this case.

PLEADING CUSTOM.

Counsel for appellees, as we understand it, do not dispute the rule that local custom, in order to be taken advantage of, must be pleaded, but we are told that although we object to the introduction of any testimony or evidence of a local custom, that our objections were not sufficient. We are not told why, but the general statement is made that we made no such objection. We wish to call the Court's attention in this regard, at page 471, Volume II, Transcript of Record. We objected to this question

upon the ground that the question was incompetent. The question is again asked of the same witness at page 472, and the objection is made that the question is incompetent and immaterial. In fact, whenever this question was propounded in any way, shape or form, it was met with the objection of the appellant that it was incompetent, irrelevant and immaterial. It seems to us that this objection was sufficient.

AMENDMENT.

Counsel for appellees have asked the Court to permit an amendment to their pleading. The character of the amendment is not stated, but, as we understand it, it is desired to amend their pleading, so as to allege this local custom. While we are always quite willing that the pleadings should be amended to conform with the facts, the difficulty here is that there are no facts, no testimony upon which an amendment can be based. If the Court is of the opinion that there is any evidence in that regard, we have no serious objection to an amendment. Our contention is and was that the evidence offered on behalf of appellees failed to show any local custom.

DAMAGES.

We have a very high admiration for the learning and ability of counsel for appellees, and our ad-

miration is surely justified in the magnificent manner in which it is attempted by them to reconcile the rule for the measure of damages announced by Judge Donworth with the rule for the measure of damages adopted by Judge Cushman. Nothing but genius of the very highest order could possibly suggest a scheme which will reconcile these two decisions, and whether they have successfully done so, we, at least, give them due credit for their magnificent effort.

We respectfully submit that the judgment of the lower Court ought to be reversed.

G. C. FULTON,
Solicitor for Appellant.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION,
a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J.
P. COYLE,

Appellees.

Appeal from the United States District Court for
the Western District of Washington,
Southern Division.

HON. GEORGE DONWORTH, JUDGE.

HON. EDWARD E. CUSHMAN, JUDGE.

**REPLY BRIEF OF APPELLEES
IN SUPPORT OF
MOTION TO DISMISS THE APPEAL**

WELSH & WELSH,
South Bend, Wash.

DORR & HADLEY,
Seattle, Wash.

Solicitors for Appellees.

FILED

LOWMAN & WINFORD CO., SEATTLE

SEP 11 1914

No. 2396

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION,
a Corporation,

Appellant,

vs.

H. S. McGOWAN, ERICK LINDSTROM and J.
P. COYLE,

Appellees.

Appeal from the United States District Court for
the Western District of Washington,
Southern Division.

HON. GEORGE DONWORTH, JUDGE.

HON. EDWARD E. CUSHMAN, JUDGE.

**REPLY BRIEF OF APPELLEES
IN SUPPORT OF
MOTION TO DISMISS THE APPEAL**

Subsequent to the service upon counsel for appellant of our motion to dismiss, he has served a counter motion seeking an order directing the issuance of a new citation to the surety on the injunction bond, the party which did not join in the appeal, upon the theory that the defective appeal can be cured by the issuance of a new citation.

The citation is a notice issued, not to the appellant, but to the appellees, after the appeal has been perfected, directing him to appear in the appellate court and show cause why the judgment of the lower court should not be reversed. It properly belongs to proceedings under a writ of error, and not an appeal. It is not jurisdictional and may be waived.

Rose's Code of Federal Procedure, Vol. 2, pp. 1522-24, citing numerous authorities.

Nome and Sinook Co. v. Am. Mercantile Co.,
187 Fed. 929.

We emphasize this point of procedure as distinguished from the formal method of taking an appeal, by petition and allowance, because the authorities cited by counsel to oppose our motion are nearly all concerned with the issuance of new citations, a matter not properly involved here.

Our contention is that all the necessary parties against whom a joint judgment was entered have not joined in the appeal, and the defect being jurisdictional is one which can not be cured by amendment.

Section 1005 of the Revised Statutes permits certain amendments to writs of error in matters of form, and is the basis of most of the decisions relied upon by counsel for appellant:

“The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the *teste* of

the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error. (R. S.)”

4 Fed. Stat. Ann., Sec. 1005, p. 617.

It will be observed that this statute permits amendments in matters of form when the rights of the defendant in error will not be prejudiced.

The case of *Estis v. Trabue*, 128 U. S. 225, quoted extensively in our main brief on the motion, expressly states that the omission of the sureties who were necessary parties to the appeal is a defect:

“* * * which cannot be reached by an amendment in or by this Court under §1005.”
(P. 229.)

The cases of:

Martin v. Buford, et al., 176 Fed. 554;
Teal v. Chesapeake Bay Co., 204 Fed. 914;
Browning v. Boswell, 209 Fed. 788;
Nome and Sinook Co. v. Am. Merc. Co., 187 Fed. 929,

are relied upon by counsel for appellant, but those decisions all involve the issuance of new citations in

cases wherein the name of a *successful party* had been omitted in taking the appeal, a proposition entirely foreign to the case at bar, which involves the failure of one of the *unsuccessful parties* to join in the appeal.

The rule is well stated in Rose's Code of Federal Procedure, Vol. 2, at page 1528, as follows:

“An amendment will be refused also where a necessary party defendant has not been joined or severed for failure or refusal to join.”

Counsel relies upon the case of *Gilbert v. Hopkins*, 198 Fed. 849-51, decided by the Circuit Court of Appeals of the Fourth Circuit, as being decisive of this question. In that case a motion to dismiss was based upon two grounds, first: that one of the *defendants in error* was omitted from the writ, and was not served with a citation; second: that the surety company on the *cost bond* of the plaintiffs in error was not joined as a plaintiff in error. The motion was denied, and the Court confined its discussion entirely to the first ground, which was based upon section 1005, R. S. No facts are stated in the opinion which in any way indicate that the surety company was a party to a joint judgment, which would make it a necessary party to the appeal. It is easy to differentiate between the liability on a mere cost bond, and the liability on an injunction bond, where the damages were assessed and judgment entered jointly against the principal and surety. The only reasonable conclusion, in absence of any statement of facts in the opinion in *Gilbert v.*

Hopkins and in view of the decisions of the Supreme Court of the United States, is that the liability of the surety in that case was not such as to bring it within the well-settled rule.

The decisions cited in our brief on the motion to dismiss are sufficient to establish beyond doubt that all the parties against whom a joint judgment is entered must join in the appeal, or show reason for non-joinder.

Estis v. Trabue, 128 U. S. 225;

Mason v. United States, 136 U. S. 581;

Masterson v. Herndon, 10 Wall. 416;

Dolan v. Jennings, 139 U. S. 385,

(and numerous other authorities cited in our brief.)

We wish also to direct the attention of the court to the case of *Copland v. Waldron* (9th C. C. A.), 133 Fed. 217.

An appeal was taken by two of three joint defendants from a judgment against all of them; a motion to dismiss the appeal was made because one of the joint defendants had failed to join in the appeal. A counter motion, based upon section 1005, R. S., was interposed for an order allowing the amendment of the citation so as to include the name of the third defendant, or for an order directing the issuance of a new citation *exactly as has been done in the case at bar*. The motion to amend the citation was denied, and motion to dismiss the appeal was granted, upon the authority of *Estis v. Trabue*, 128 U. S. 225, and *Mason v. United States*, 136 U. S. 581. Without quoting the opinion at length, we set

forth the syllabus, which correctly states the ruling of the court:

“Where an appeal was taken by two of three defendants against whom a joint decree for a sum of money was rendered and the record fails to show that the third defendant, who made default in the court below, was in any manner joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect is not one of form only, which the Circuit Court of Appeals may permit the appellants to cure by amendment, under Rev. St. Section 1005 (U. S. Comp. St. 1901, p. 714), but is fatal to jurisdiction of the appeal.”

Copland v. Waldron, 133 Fed., p. 217.

We submit that the failure of one of the parties, against whom a joint judgment was entered, to join in the appeal, is a jurisdictional defect which cannot be cured by amendment; and in view of the authorities, our motion should prevail and the appeal should be dismissed.

Respectfully submitted,

WELSH & WELSH,
South Bend, Wash.
DORR & HADLEY,
Seattle, Wash.
Solicitors for Appellees.

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION

a corporation

Appellant

vs.

H. S. McGOWAN, ERICK LINDSTROM and

J. P. COYLE

Appellees

**Appeal from the United States District Court for the
Western District of Washington, Southern Division**

Hon. George Donworth, Judge

Hon. Edward E. Cushman, Judge

Petition for Rehearing

DORR & HADLEY, Seattle, Wash.

GRIFFITH, LEITER & ALLEN, Portland, Ore.

Solicitors for Appellees.

G. C. FULTON, Astoria, Ore.

Solicitor for Appellant.

Filed

JAN - 2 - 1915

F. D. Menck

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION

a corporation

Appellant

vs.

H. S. McGOWAN, ERICK LINDSTROM and

J. P. COYLE

Appellees

**Appeal from the United States District Court for the
Western District of Washington, Southern Division**

Hon. George Donworth, Judge

Hon. Edward E. Cushman, Judge

Petition for Rehearing

Having carefully examined the opinion of the honorable court, we think that with propriety we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellees on the following grounds:

I.

The first issue to which we respectfully direct the court's attention is involved in the third question

decided by the court, which was: Did the court have equitable jurisdiction of the case by reason of having acquired jurisdiction of the person of the defendants? The court has answered this question in the negative. This answer is based upon the assumption that a court of equity has not the jurisdictional power to abate a nuisance existing in a foreign jurisdiction and cannot indirectly do so by virtue of acting *in personam* through its personal control of the parties.

First, we respectfully submit that the presumptions, if any, should favor the view that the lower court had jurisdiction. This case can be said to stand, in justice to all parties concerned, in a different light than a case in which, with knowledge of jurisdictional or territorial limits, equitable relief of an extra-territorial nature was sought and allowed. These defendants, through a mistake not of their own making, were enjoined by this court and by virtue of its decree were for years prevented from enjoying their legal rights to their damage in the amount of \$22,083.00. Under these circumstances, it would not seem unreasonable that the plaintiff, having invoked that jurisdiction originally, should be held to be estopped to question that jurisdiction, and authorities hereinafter cited justify such an estoppel. Certainly the defendants in this case have suffered no inconsiderable hardship by virtue of this mistake, and for this reason, unless it is certain that the action of the court was absolutely

ultra vires, and unless it can be said that it was not a jurisdictional question in the decision of which an equity court might have some latitude for discretion, we respectfully submit that in this case the jurisdiction of the lower court should be upheld. We believe that the considerations hereinafter suggested justify the conclusion that the lower court had jurisdiction.

We call attention to the fact that in its treatment of the jurisdictional question this court has regarded it as a case wherein the trial court was asked to assume jurisdiction only to abate a nuisance and to protect rights in real property. We submit that the relief claimed was of a broader scope and that under the pleadings in this case an equity court could have granted relief of a different nature. A consideration of the pleadings shows that it is true that the plaintiff in its Amended Complaint (Transcript, pages 15, 16) asked for the abatement of a nuisance and the protection of real property rights. An examination of the defendants' Cross-Bill and Complaint (Transcript, pages 73, 92), however, shows that injunctive relief was asked protecting the right of the defendant McGowan to exercise in these waters the public right of fishery, regulated as it was by the state that \$20,000.00 damages were asked and such other relief in the premises as the nature of the case might require, or as should be just. Similar relief was asked in the Supplemental

Cross Bill which was filed in 1910 (Transcript, page 162).

That the public right of fishery is a personal privilege and a right of citizenship belonging to the members of the general public and thus distinguished from a real property right is demonstrated by the case of *Hume v. Rogue River Packing Co.*, 51 Ore. 237, 250. The fact that the state has regulated the public right of fishery by virtue of its police power does not affect the proposition that it is a public right. The right to damages for infringement of such a personal right is certainly a transitory matter.

As is suggested, the decision of this court seems to be predicated upon a narrower idea of the controversy before the court and the relief prayed for than the pleadings justify, and its conclusion is founded on the idea that an equity court cannot abate a nuisance in a foreign jurisdiction, or abate conditions constituting an interference with rights in real property.

We respectfully call the court's attention to the fact that the cases, cited as authority in the opinion, are cases in which the court objected to allowing affirmative relief to protect foreign real estate, and that an action for an accounting was not concerned. The case of *Gilbert v. Moline Water Power and Mfg. Co.*, 19 Ia. 320, and cited on page 21 of the typewritten copy of the court's decision, is a case

of this kind, wherein the court was asked to abate a nuisance, that is, to grant relief requiring affirmative action by the officers of the court at a point beyond the territorial jurisdiction of the court; that the relief required affirmative action, and action *in rem*, and that the impossibility of the officers of the court taking affirmative action *in rem* at a point outside of the court's territorial jurisdiction, was the consideration which determined the court's decision, is shown by the following dicta quoted on page 23 of the typewritten copy of the decision: "And this conclusion is more warrantable when we consider that in this case the main dam extends from the main shore to the island (Rock Island); that this island contains hundreds of acres of land, is indisputedly a part of the territory of our sister state, and *that to reach this obstruction or nuisance, our courts and the officers thereof must go beyond this island and decree and procure the removal of a work attached to the main shore, * * **"

The case of *Miss. & Mo. Ry. Co. v. Ware*, 67 U. S. 485, a case in which three judges of the Supreme Court dissented, is a similar case. The court in the part of the decision quoted on page 23 of this court's opinion pointed out in a paragraph found on page 24 that the action was a proceeding *in rem*, saying: "It was at the long pier and in the Illinois draw east of that pier that the complainant's boats sustained the injuries on which he founded his

rights to sue the Iowa corporation *and to proceed against the bridge in rem as a public nuisance.*" In this case it is particularly pointed out in the opinion of Mr. Justice Catron that no damages were sought and that the plaintiffs asked nothing from the person of the defendant. The general language cited from the work of Mr. Pomeroy, Sec. 1318, seems to be based upon this case of *Miss. & Mo. Ry. Co. v. Ware*.

We respectfully submit that there is and should be a clear distinction between cases where a court is asked to grant affirmative relief requiring its officers to go into a foreign jurisdiction and requiring action *in rem* and which primarily involve real property, and a case where an equity court having personal jurisdiction of the defendant is asked to protect a right which is an incorporeal right, or a right of citizenship, by restraining present and future action, and wherein the court is asked to give a personal judgment for damages. Unlike cases of the former kind, the case at bar involved a cause of action which was transitory, and the decree of the court given by virtue of its power *in personam* over the parties before the court did not require affirmative action of the court or its officers in territory beyond the jurisdictional limits of the court, nor was it an action *in rem*.

We respectfully call the court's attention to the following authorities which establish that in cases similar to the case at bar an equity court has com-

petent jurisdiction whereby it may give a remedy, not by granting affirmative relief but by *restraining* the person of the defendant, and that the court, in the case at bar, from the standpoint of the true theory of equity, could restrain the acts complained of, even though it be admitted, for the sake of argument, that these rights, which were thus protected, stand upon the same plane as rights in real property.

Jennings Bros. Co. v. Beale, 27 Atl. 948, is a case in which a Pennsylvania equity court was held to have jurisdiction to restrain trespass to lands not within its territorial jurisdiction.

In *French v. McGuire*, 55 How. Pr. (N. Y.) 471, a New York court at the complaint of a citizen of New York and having personal jurisdiction of the defendant, restrained him from performing or exhibiting a drama in San Francisco.

In the case of *Louisville, etc., Co. v. Western Union Tel. Co.*, 207 Fed. 1 (C. C. of A., 6th Circ.), it was held that a federal court in Kentucky had jurisdiction to enjoin the defendant from interfering with the operation of certain telegraph lines on rights of way in other states. The court held that the equitable principle allowing equity courts to require or enjoin acts done in foreign jurisdictions does not apply only in cases of fraud, trust and contract, but that this jurisdiction is of broader scope, and cites the decision of *Philadelphia Co. v. Stimson*, 223 U. S., page 623, as authority.

In *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462, it was held in a case which thoroughly discusses the equitable principles involved, that where the defendant was within the jurisdiction of the court, he might be enjoined from destroying a dam in the State of Maine, on the theory that since the defendant was within the limits of the court and subject to its jurisdiction, he could be forbidden to go elsewhere and commit an injury to property there situated.

In *Alexander v. Tolston Club*, 110 Ill. 65, 77, it was held that an Illinois court could prevent the defendant from interfering with a right of way claimed over lands situated in Indiana, the court having personal jurisdiction of the defendant.

In *Schmaltz v. York Mfg. Co.*, 53 Atl. 522 (Penn.), it was held that a Pennsylvania court could restrain the removal of a brewery situated in New York.

In *Kirklin v. Atlas Savings and Loan Association*, 60 S. W. 149, it was held that an equity court in Tennessee had jurisdiction to restrain an interference with lands or with personal property situated without the state, by virtue of the court's power over the person of the defendant.

In *Frank v. Payton*, 82 Ky. 150, it was held that an equity court in Kentucky could restrain the defendant of whom it had personal jurisdiction from conveying away lands situated in Illinois.

Cole v. Cunningham, 133 U. S. 107, 33 Law. Ed. 539, establishes the jurisdiction of a chancery court to restrain the commencement of a suit in another jurisdiction, citing a variety of American cases on this general proposition and announcing that the settled rule of American and English jurisprudence sanctions such action.

In the case of *Munson v. Tyron*, 6 Phila. 395, it was held that a court might restrain a trespass to a coal mine outside the jurisdiction of the court, the court saying that there was a clear distinction between cases requiring affirmative action and cases wherein the court by acting upon the conscience of a person before it, by granting relief of a negative character, could restrain acts involving rights to property located in a foreign jurisdiction.

Such cases as have refused to allow an equity court to restrain a trespass to foreign real estate are based upon the analogy of trespass actions in law. We submit, first, that an action should lie at law for trespass to realty; and second, that even were this not true, that there is no reason why equity should follow the analogy of the law procedure.

The doctrine that an action *at law* will not lie for injuries to foreign real estate is an old doctrine and one which is a part of the common law simply by virtue of the fact that it is an aged precedent. Attention is called to the very early case of *Livingstone v. Jefferson*, Fed. Case 8411, 1 Brock, 203,

in which Mr. Justice Marshall, as a circuit judge, renders an opinion in a case involving the question of whether or not an action in law lies for a trespass to foreign realty. He was of the opinion that the only justification for holding that an action or trespass would not lie was that it was established by authority. He argued against the rule, showing that it was purely technical, founded on no sound principle, and often resulted in defeating justice, and reciting that Lord Mansfield had made a vain endeavor to abolish the rule in English jurisprudence. By the English judicatory act of 1873, which abolished the distinction between local and transitory venues, the rule has been abolished. This criticism of the rule by Lord Mansfield and Chief Justice Marshall has received approval in certain American courts, which have allowed an action for foreign trespasses, a leading case upon the question being the case of *Little v. The Chicago, etc., Ry. Co.*, 67 N. W. (Minn.), 846, a case in which the question receives careful and illuminating consideration and in which it is demonstrated that there is no reason why there should be a distinction between a tort committed to a person and a tort involving rights in real property.

Under these circumstances, what reason is there for holding that the equity court in the case at bar was not of competent jurisdiction, when that holding is to be based upon an analogy of the law which on eminent authority has no foundation in princi-

ple and is the law of the land simply by virtue of the fact that its precedents are old and long established? Is there any possible or reasonable distinction between the long line of cases which have held that a person under the duty of actual trust or by virtue of a constructive trust arising from fraud can be compelled by an equity court, acting *in personam*, to convey land located in a foreign jurisdiction, and a case where the court is asked to restrain the defendant from doing acts in a foreign jurisdiction which injures property there situated?

In relation to this distinction, the case of *Louisville, etc., Co. v. Western Union Tel. Co.*, 207 Fed. 1, at page 6, said:

“Appellant contends that this principle applies only to cases of fraud, trust and contract, and so is without application here. * * * But we have found nothing in any of the cases to which our attention has been called limiting the jurisdiction to such cases. On the other hand, there is no apparent reason for such limitation. Indeed, in *Philadelphia Co. v. Stimson*, 223 U. S. at page 623, 32 Sup. Ct. 345, 56 L. Ed. 570, which was not a case of fraud, contract or trust, the Supreme Court of the District of Columbia was expressly held, upon a bill filed to set aside certain harbor lines in the harbor of Pittsburgh, Pa., to have jurisdiction to restrain the Secretary of War from causing a criminal proceeding to be instituted

against complainant because of the reclamation and occupation of its land outside the prescribed limits."

It is submitted that in accordance with the view of Chief Justice Marshall and Lord Mansfield, there is no logical reason why a law court should not give damages for a foreign tort involving real property just as it does where personal rights are involved. It is submitted that in accordance with the authorities herein referred to, there is no logical reason why an equity court which admittedly has the right to restrain or to enforce action on the part of one under a trust relationship as to foreign realty, should not restrain action where damage is threatened to real property rights existing in a foreign jurisdiction, and in the case at bar, looking at it in the narrow aspect of simply a case to restrain a trespass to foreign lands, it is submitted that the reasonable holding of this court should be that the lower court had jurisdiction.

Whatever may be the ultimate view of this court on the question of the right to restrain injuries to foreign real estate, in the case at bar there was protection asked for incorporeal and personal fishing rights, which are rights of citizenship. Damages were also asked. The cases refusing injunctive protection of foreign real estate follow the analogy of a rule of law. This rule of the law is unjust and highly technical, and equity courts have rightly refused to follow it. Therefore,

in the case at bar this court, in reviewing the decree of an equity court involving other rights than those of real property, is justified in not following such precedents, particularly when, by the best reasoned cases, those precedents have not been followed, even in cases involving real property. The jurisdiction of the lower court, in view of the great injustice to these appellees of dismissing them without redress for the losses arising from the deprivation for four years of their property rights, should be upheld where rights other than real property rights were before the lower court and where damages were allowed.

Attention is called to this distinction. The question in this case is not whether it is expedient for an equity court to do what this court did. The question is, did it have the power? Thus any arguments which go to the question of expediency from grounds of policy or otherwise of the court's exercise of extra-territorial authority, are not in point.

II.

It is respectfully submitted that when the appellant has invoked the jurisdiction of an equity court and has for years effectively deprived the appellees of their legal rights, that the appellant cannot now be heard to deny that the court had jurisdiction, when that denial is made for the purpose of evading the court's decree entered in an

effort to redress the wrongs thus suffered by the appellees. The attention of the court is again directed to the argument on page 33 of the appellees' brief and to the following authorities, in which an estoppel has been held to exist in similar circumstances:

In *Cumberland Coal Co. v. Hoffman S. C. Co.*, 39 Barb. 16, 15 Abb. Pr. 78, the court held that want of jurisdiction over the subject-matter of the action did not deprive the defendant of the right to damages upon the injunction undertaking when the injunction was dissolved.

In *Adams v. Olive*, 57 Ala. 249, it was held that the party obtaining an injunction will not be allowed to take advantage of their own wrong to be relieved from the obligation of their bond in case the injunction proved to have been issued without jurisdiction.

The same doctrine was applied in the following cases:

Walton v. Develing, 61 Ill. 207.

Hanna v. McKenzie, 5 B. Mon. 314; 43 Am. Dec. 122.

It would seem that the standing of a case which has been removed to the U. S. Court is substantially the same as one originally commenced in that court. In such cases it is uniformly held that after a case has been removed upon the petition of the defendant that thereafter he is estopped to

claim that the federal court has no jurisdiction: *Mastin v. Chicago, R. I. & P. R. R. Co.*, 123 Fed. 827; *Cowley v. Nor. Pac. Co.*, 159 U. S. 570, 40 L. Ed. 263; *Fisher v. Shropshire*, 147 U. S. 133, 145, 37 L. Ed. 109.

III.

Through inadvertence the mandate of this court was issued to the lower court during a pendency of this petition for a rehearing. This mandate has since been returned by the clerk of the district court. The following citations of authority demonstrate that the mandate may be recalled and that the power is in this court to vacate, alter or amend its decree during the term at which it was made:

Bronson v. Schulter, 104 U. S. 410, 26 L. Ed. 797.

In this case the Supreme Court, speaking through Mr. Justice Miller, announces that it is a general rule of law that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court, which pronounces them, during the term at which they are rendered or entered of record, and may then be set aside, vacated or modified by that court. This case seems to be the leading case upon the question and has been followed generally by the federal courts. Attention is called to the following decisions:

Waskey v. Hammer, 179 Fed. 273 (C. C. of A, 9th Circ. 1910).

Miocene Ditch Co. v. Champion Mining and Trading Co., 197 Fed. 497 (C. C. of A., 9th Circ. 1912).

Peabody v. City of Edmonds, 131 Pac. (Wash.) 250.

An examination of these cases shows that it is immaterial that the mandate has been entered of record. To this effect see *St. Paul Fire and Marine Ins. Co. v. Peck*, 139 Pac. 117 (Wash.), where the mandate had been entered of record, and execution had issued.

Wherefore, upon the foregoing grounds, these appellees and petitioners respectfully pray this honorable court to grant to them a rehearing of the said cause.

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Solicitors for Appellees.

I,, of counsel of appellees herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

.....*ag*.....

